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**MINNESOTA REPORTS**

**VOL. 55**

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**CASES ARGUED AND DETERMINED**

**IN THE**

**SUPREME COURT OF MINNESOTA**

**SEPTEMBER—DECEMBER, 1893**

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**CHARLES C. WILLSON**

**REPORTER**

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**SECRETARY OF THE STATE OF MINNESOTA, IN TRUST FOR THE BENEFIT OF THE  
PEOPLE OF SAID STATE**

*Recd Mar. 4, '89*

**JUDGES**  
**OF THE**  
**SUPREME COURT OF MINNESOTA**

**DURING THE TIME OF THESE REPORTS.**

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**HON. JAMES GILFILLAN, CHIEF JUSTICE.**  
**HON. WILLIAM MITCHELL.**  
**HON. CHARLES E. VANDERBURGH.**  
**HON. LOREN W. COLLINS.**  
**HON. DANIEL BUCK.**

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**ATTORNEY GENERAL,**  
**HON. HENRY W. CHILDS.**

(iii)

By 1878 G. S., ch. 27, § 2, the reporter is required to report all cases argued and determined in the court.

By the practice of the court, based on 1878 G. S., ch. 63, § 4, the head note in each case is prepared by the Judge writing the opinion.

The statement of the case is made by the reporter, from the return to this court. The epitome of the arguments is condensed from the briefs of counsel. For the correctness of these, the reporter alone is responsible.

The number between the title and the syllabus of each case reported, is the number of the case in the files of the clerk of this court.

Dated Rochester, Minn., December 30, 1894.

CHAS. C. WILLSON.

(iv)

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CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF MINNESOTA.

---

JOSEPH CONGDON *vs.* LEVI L. COOK.

Argued June 19, 1893. Affirmed Sept. 8, 1893.

No. 8184.

**Lien Law of 1889, Ch. 200, § 5, Includes Lessors.**

The language "the owner or person having or claiming any interest," found in section 5 of the lien law of 1889, must be held to include lessors of land improved by the lessee; and unless the notice required by the same section is given, or the omission is reasonably accounted for or explained, the estate of the lessor may be bound by liens given by that act, subject to the limitation in respect to "repairs" in the proviso of the same section.

**Entry to Post Notice against Lien.**

The right of entry to post the notice being given by law, a peaceable entry for such purpose is not a trespass.

**The Lien Law in This Regard is Valid.**

The statutory provision in question is a valid exercise of legislative power, and the legal basis of the lien in such cases, as against the owner, is his consent to an improvement presumably beneficial to the property.

Appeal by defendant, Levi L. Cook, from an order of the District Court of Hennepin County, *Charles M. Pond, J.*, made January 27, 1893, denying his motion for a new trial.

On October 13, 1887, defendant Cook leased to Byron Towne the premises on the southwest corner of Hennepin Avenue and Fourth Street in Minneapolis, one hundred and twenty three (123) feet front on the Avenue by one hundred and eighteen (118) feet deep.

The lease was for the term of five years with the privilege of renewal for another term of ten years. Towne agreed to pay all taxes and assessments on the property and \$10,000 a year rent quarterly in advance. Towne assigned the lease to Asa K. Waters and he on July 28, 1891 employed the plaintiff, Joseph Congdon to build a two story frame and brick building twenty three and a half feet front on the westerly part of the premises and agreed to pay him therefor \$1,932. Congdon completed the building September 3, 1891, and filed a lien on the premises for the price, and commenced this action to foreclose it. He made the owner Cook one of the defendants and alleged that Cook saw the building in process of erection but did not give notice that his interest in the property should not be subject to a lien for the same. Cook answered, stating that he owned the property and leased it to Towne, that he saw plaintiff constructing the building in place of an old one which had been partly destroyed by fire, and that he gave no notice. He denied that his estate in fee was subject to the lien. The trial court held it was, and ordered the property sold to pay plaintiff's demand. Defendant Cook moved for a new trial on the ground that the decision was contrary to law. The motion was denied and he appeals.

*Keith, Evans, Thompson & Fairchild*, for appellant.

Laws 1889, ch. 200, § 5, is a statutory rule of evidence in the nature of an equitable estoppel, raising a *prima facie* presumption of consent on the landowner's part, if, knowing any building is being erected on his land he keeps silent when fairness and common honesty require him to speak, except in cases when the circumstances are such that dissent is impossible. *Haupt Lumber Co. v. Westman*, 49 Minn. 397; *Martin Lumber Co. v. Howard*, 49 Minn. 404; *Wheaton v. Berg*, 50 Minn. 525.

When the circumstances are not such as to raise an equitable estoppel, and when those who may be engaged in contributing labor and material to the improvement of the land do not have reason to suppose the work is being carried on at the instance or with the consent of the landowner, his failure to give notice that his interest in the land will not be subject to lien, will not subject his interest to the contractor's lien. The purpose of the statute being to fur-

nish a rule of evidence in the nature of an equitable estoppel, there must appear such a state of facts as will support the estoppel, independent of the failure to comply with the requirements as to giving notice.

The settled case shows that plaintiff expressly testified that his contract for construction was with Waters; that he knew Waters had a lease of this property, and was erecting this building under his lease. And in the lien statement, he stated that at the time he furnished the material and performed the labor upon this building, Waters was the owner of a leasehold interest in said real estate, and was the absolute owner of said building. Here is no case of a mistake or the supposition that the work was procured to be done by the defendant, Cook. *West Coast Lumber Co. v. Apfield*, 86 Cal. 335.

As Laws 1889, ch. 200, § 5, raises only a *prima facie* presumption of consent, such presumption can, of course, be rebutted, and we claim was rebutted in this case. There was, in fact, in this case no consent to this improvement and any *prima facie* presumption of such consent was fully rebutted by the positive statement of defendant in connection with the situation of the property and the long time lease under which he had parted with the possession and control. *Meyer v. Berlandi*, 39 Minn. 438; *O'Neil v. St. Olaf's School*, 26 Minn. 329.

The court has recognized in *Wheaton v. Berg*, 50 Minn. 525, the arbitrary nature of the provisions of Laws 1889, ch. 200, § 5, respecting notice, and we urge that such provisions should be entirely rejected as unconstitutional, because of their arbitrary, unreasonable and impracticable character.

But if the provisions of this section regarding notice are to stand, we claim that the appellant comes within the proviso at the end of the section: "But no lien shall be allowed as against a lessor for repairs made by or at the instance of the lessee."

A building erected at the lessee's instance, for his own benefit, which does not form any part of the realty, and which he may remove from the land, ought not to be charged upon the lessor's interest in the land, and yet a narrow interpretation of the word "repairs" might result in making the interest of the lessor liable therefor.

Any other construction than the one for which we contend would require remainder men, reversioners, and persons owning inchoate interests in land to comply with the terms of this section. We cannot believe that the Legislature so intended or that this court will so hold.

The lease in question was made and the control of the property surrendered two years before the passage of the present lien law. The new law puts it into the power of the lessee to charge the lessor's interest in the land with any improvements which the lessee may make thereon, unless the lessor shall actively interfere, as he was not required by law to do when the lease was made. This operates to impair the obligations of the contract of lease, and the law is therefore void so far as it applies to this lease. *Hillebert v. Porter*, 28 Minn. 496; *O'Brien v. Krenz*, 36 Minn. 136; *Green v. Biddle*, 8 Wheat. 1.

*W. E. Hale and Charles B. Peck*, for respondent.

A lessee of real property under a lease for five years with privilege of renewal, erects a building with the knowledge of the owner of the fee, the latter does not serve or post the notice required by Laws 1889, ch. 200, § 5, and the contractor seeks to enforce his lien upon the interest of both lessee and lessor. It is within the power of the Legislature to enact such a statute. Whether it be called a rule of property or a rule of evidence is immaterial. *Meyer v. Berlandi*, 39 Minn. 442; *Miller v. Stoddard*, 50 Minn. 272; *McCausland v. West Duluth Land Co.*, 51 Minn. 246; *Menzel v. Tubbs*, 51 Minn. 364; *Wheaton v. Berg*, 50 Minn. 525; *Burkitt v. Harper*, 79 N. Y. 273; *Hicks v. Murray*, 43 Cal. 515; *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275; *West Coast Lumber Co. v. Apfield*, 86 Cal. 335; *Harlan v. Stufflebeem*, 87 Cal. 508; *Otis v. Dodd*, 90 N. Y. 336; *Barclay v. Wainright*, 86 Pa. St. 191; *Ness v. Wood*, 42 Minn. 427; *Boteler v. Espen*, 99 Pa. St. 313; *Johnson v. Dewey*, 36 Cal. 623; *Cornell v. Barney*, 94 N. Y. 394; *Conant v. Brackett*, 112 Mass. 18.

The Legislature, by making any person owner of or interested in real property responsible for the cost of buildings erected, constructed, altered, removed to or repaired upon his land, unless he posts or serves this notice, has brought within its provisions a les-



nor such as is defendant herein, and by the addition of a proviso that no lien shall be allowed as against a lessor for repairs, made by or at the instance of a lessee, has even more strongly defined his liability; and by this exception and that of the vendor mentioned in section four, they have, by limiting the exceptions to the rule to two specific instances, unmistakably brought within the scope of the general words first used, every person except the two mentioned in the saving clause. *United States v. Dickinson*, 15 Pet. 141; *Farrell Foundry v. Dart*, 26 Conn. 376; *Gibbons v. Ogden*, 9 Wheat. 1; *Brown v. Maryland*, 12 Wheat. 419; *United States v. Gilmore*, 8 Wall. 330.

There is only one avenue of escape, only one excuse which appellant Cook can give for his failure to post or serve the notice required by section five, not that it was impossible from any physical or mental cause, but simply that he did not know the law.

VANDEBURGH, J. Section 5 of the general lien law of 1889 was, in my judgment, clearly intended to include within its provisions the owners of leased lands improved by a lessee, with the limitation only that the lien therein provided should not extend to "repairs" by, or at the instance of, the lessee. There is nothing in the section that would warrant the court in excepting lessors from the class of owners therein referred to. The language is: "Every building or other improvement \* \* \* erected, constructed, \* \* \* or repaired upon any land with the knowledge of the owner of such land, or of any person claiming an interest therein otherwise than as *bona fide* prior mortgagee, incumbrancer, or lienor, shall be held to have been erected, constructed, \* \* \* at the instance of such owner or person, only so far as to subject his interests to a lien therefor; \* \* \* and such interest shall be subject to any lien given by the provisions of this act, unless such owner or person shall, within five days after he shall have obtained knowledge of the erection \* \* \* aforesaid, give notice that his interest shall not be subject to any lien for the same, by serving a written or printed notice to that effect personally upon all persons performing labor or furnishing \* \* \* material therefor, or shall, within five days after he shall have obtained the knowledge aforesaid or knowledge of the intended erection, \* \* \* give such notice as aforesaid by

posting and keeping posted a written or printed notice to the effect aforesaid, in a conspicuous place, upon said land, or upon the building or other improvement situate thereon. But no lien shall be allowed as against a lessor for repairs made by or at the instance of the lessee."

• The language "the owner or person having or claiming any interest therein" unmistakably includes a lessor of lands, and there can be no question of the validity of the legislation. *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, (22 Pac. Rep. 231;) *Heath v. Solles*, 73 Wis. 222, (40 N. W. Rep. 804;) 15 Amer. & Eng. Enc. Law, p. 22.

The clause in the proviso exempting a lessor from liens for repairs at the instance of the lessee by a reasonable limitation excludes other improvements from the operation of that part of the proviso, and as to them the general rule expressed in the body of the section is left in full force. *Suth. St. Const.* § 223.

To the legislative mind there might appear very good reasons why, especially in the case of ground leases, a distinction should be made between the construction of new buildings and repairs upon old.

The ground upon which a lien upon the interest of the owner out of actual possession is sustained in such cases is his consent. *Loonie v. Hogan*, 9 N. Y. 435, (61 Amer. Dec. 700, notes;) *Burkitt v. Harper*, 79 N. Y. 273.

The evidence of his consent is the failure of the owner, after he acquires knowledge of the improvement, to give or post the notice required by the statute. This branch of the case is, however, fully covered by the opinion in the case of *Wheaton v. Berg*, 50 Minn. 525, (52 N. W. Rep. 928,) and need not be further considered here. Under the construction there given, the law is not unreasonable or difficult of practical application, and the lessor always has an opportunity to be heard in the lien suit. The lessor, though out of possession, may enter under the protection of the statute to give or post the original notice. Such an entry is not an unlawful invasion of the rights of the tenant or a trespass. No wrong or injury is inflicted on the tenant or his property. The landlord enters by necessity, and under the authority of the law to protect his interest in the reversion. In such cases no action lies. *Brown v. Beatty*, 34 Miss. 227, (69 Amer. Dec. 394.)

In opposition to the enforcement of the lien against the estate of the lessor in this particular instance, it is urged that the improvement is for the benefit of the lessee only, because of the provisions in the lease entitling him to remove the building at the expiration of the term.

The building in this instance is a frame and brick building, with substantial foundations; and while, upon certain conditions, it may be removed, yet, it is liable to remain as a permanent improvement of the property, under the privilege of renewal given in the lease; and, unless the stipulated conditions are complied with, such removal is prohibited by the terms of the lease, which requires, among other things, that the lessor shall have previously "paid all rents, taxes, assessments, and charges due on or to accrue up to the expiration of the term about to expire." We have no doubt that the lessor might so far be subrogated to the rights and remedies of the lienholder that, upon the payment by him of any valid lien claim binding on him as owner, the same might be enforced as an equitable charge upon the improvements made by the lessee; but, apart from such considerations, it is enough that the statute is a valid exercise of legislative power, and the legal basis of the lien as against the owner is his consent to an improvement presumably beneficial to the property.

He is directly interested in improvements which, in the case of ground leases such as this, are contemplated thereby; for, without them, the leased premises would be comparatively unproductive, and the rent could not be earned.

The evidence justified the court in finding that the plaintiff had seasonable knowledge of the improvement, and it was his duty to give the required statutory notice, or show a valid excuse, which he failed to do. It is also sufficiently clear that the material and labor for which the lien was allowed and adjudged was not for repairs, but for the erection and construction of a new building upon the premises.

Order affirmed.

(Opinion published 56 N. W. Rep. 253.)

**FARWELL FARMERS' WAREHOUSE ASS'N vs. MINNEAPOLIS, ST. PAUL  
& SAULT STE. MARIE RAILWAY CO.**

Argued June 13, 1893. Affirmed Sept. 8, 1893.

No. 8203.

**Equality of Railway Facilities for Dealing In and Shipping Grain.**

By Laws 1887, ch. 10, § 2, subd. b, a railway company is obliged to give equal or substantially similar facilities for the transportation of grain to all persons who in good faith erect or desire to erect warehouses at any of its stations; and if a demand therefor is unreasonably refused the state railway and warehouse commission may, after due investigation, proceed to enforce the performance of such duty.

**Terms and Conditions must be the Same for All.**

A railway company may impose reasonable terms and conditions upon persons who demand such facilities, but they must be the same for all.

Appeal by the Minneapolis, St. Paul and Sault Ste. Marie Railway Company, from the judgment of the District Court of Hennepin County, *William Lochren, J.*, entered January 25, 1893.

The Farwell Farmer's Warehouse Association on February 12, 1892, presented to the Railroad and Warehouse Commission of this state (Laws 1887, ch. 10, § 9) a complaint against the above named Railway Company that it was refused a spur track to its warehouse at Farwell. The Railway Company answered March 1, 1892, that the warehouse stood 350 feet from its nearest switch and sidetrack, that the Warehouse Company did not own the land where the warehouse stood and had no right to build thereon, that to construct a sidetrack to the warehouse would cost \$1,000 and that the business it was likely to furnish would not justify the expense. On April 1, 1892, a hearing was had before the Commission and evidence given and the Commission decided that the Railway Company was guilty of unjust and illegal discrimination against the Association and had violated the Statute, and it ordered the Railway Company to construct the track within ninety days. The Company appealed to the District Court of Hennepin County, where it was submitted October 24, 1892, on the pleadings and the report of the Commission without other evidence. After argument the Court affirmed the decision of the Commission and judgment was entered accordingly. The Complaint was made under Laws 1887, ch. 10, § 2, subd. b,

which is a substantial copy of the first clause of Section Three (3) of the Act of Congress of February 4, 1887, ch. 104 (24 U. S. Stat. p. 379).

*Alfred H. Bright and M. B. Koon, for appellant.*

Whatever may be the duty of carriers in the way of furnishing public facilities of any sort, it would seem clear that they cannot be compelled to go beyond this. The sidetrack covered by the judgment is for the sole use and benefit of the respondent. There is no pretense that it is in any sense a facility for the benefit and use of the public, like the sidetracks covered by the second proviso to the act of 1887, ch. 10, § 3, subd. c. The Railway Company is thus required to give up to the private use of plaintiff so much of its right of way as may be required for this sidetrack, and besides this to forever dedicate to the use of the plaintiff an amount of money sufficient for the construction and maintenance of the sidetrack. Certainly this is taking the property of the Company for a private use. But the property of the Company cannot in any manner or on any pretext be taken for a private use without the consent of the owner, nor can it be taken for a public use without making just compensation. *State v. Chicago, M. & St. P. Ry. Co.*, 36 Minn. 402.

The Railway Company has furnished to the public at Farwell ample sidetrack facilities for the accommodation of every individual in the exercise of every right which he holds in common with the public. What the plaintiff demands and what the court has ordered the defendant to furnish is, in effect, the right to an individual sidetrack which it would be preposterous to assume is the right of every person, because this in principle would require the Railway Company to furnish as many sidetracks as there might be individuals composing the public; if they saw fit to make the demand.

It may be suggested that the order complained of is really to subserve public convenience. In view of this, we call attention to *State v. Noyes*, 47 Me. 189; *Nelson v. Vermont Central Ry. Co.*, 26 Vt. 717.

*H. W. Childs*, Attorney General, and *Horace Austin*, for respondent, cited *State v. District Court*, 42 Minn. 249; *State v. Missouri*

*P. Ry. Co.*, 29 Neb. 550; *Mayor &c. v. Norwich & W. R. Co.*, 109 Mass. 103.

VANDEBURGH, J. The plaintiff, having erected a warehouse adjacent to the right of way of the defendant in the village of Farwell, Pope county, demanded of the defendant company that it construct a side track to the same on its right of way, to enable it to ship grain received and stored therein; and upon the refusal of its request complaint was made to the railroad and warehouse commission of the state. An investigation was had thereon by the commission in pursuance of the statute, and its findings of fact and conclusions of law made and filed, granting the petition. These findings and conclusions were adopted and affirmed by the District Court on appeal, and upon the same record the appeal from the judgment of that court is to be determined here.

The gist of the complaint is that the defendant has refused to grant to the plaintiff the same privileges or equal facilities for the shipment of grain which it has conceded to other warehousemen at the same station, and has unlawfully discriminated against the plaintiff in that respect.

The findings material to the consideration of the case are as follows: "That on the 22d day of October, A. D. 1889, the said complainant duly organized under its articles of incorporation by the election of its officers, and commenced the business for which it was incorporated; and, being then prepared and ready for the transaction of its business, did, on the 26th of said month, make application in writing to the defendant for a site or location on which to erect a grain warehouse in which to transact its said business on defendant's right of way at said Farwell station, and alongside of defendant's track thereat. That said defendant unconditionally refused said application, and wholly neglected to comply with the same. That upon such refusal upon the part of the defendant the complainant purchased and obtained a site and location for a grain house at said Farwell station, and adjacent to defendant's right of way, as near as practicable to the station building and side track of the defendant, and did then and there construct a grain house, and furnish the same with necessary equipment for storage,

handling, and shipment of wheat and other grain. That this grain house was completed and ready for the transaction of such business in the autumn of 1889, and has been occupied by the complainant in the buying, handling, and shipping of wheat and other grain ever since its completion.

That said grain house is fifty-five (55) feet from the main track of defendant's line of railway, and on land owned by the complainant.

That on the 4th day of February and on the 25th day of September, 1890, the complainant demanded of the defendant, in writing, that defendant should construct or furnish a side track or spur track at said Farwell station, which should connect by rail the said grain house with the defendant's main line or side track. That defendant could then have so constructed and can now so construct such side or spur track as that no part of the same would be off its right of way.

That the defendant has at all times refused and neglected to comply with such demand.

That the defendant corporation had not only allowed other persons or associations to erect and maintain elevators and grain houses on its said right of way, and in connection with its side tracks, at said Farwell station, previous to the making of the complainant's said application, but had also theretofore permitted other persons and associations to construct and erect grain warehouses and elevators at the station on said road next to the east and at a station thereon next to the west of said Farwell station, and not more than six miles therefrom in either direction. That such warehouses and elevators were built and erected at the said stations pursuant to such permission and consent of the defendant before the making of the complainant's said application, and have, since the erection of the complainant's said house, been operated and conducted in competition therewith; and the same is also true of the two grain houses erected on the right of way at said Farwell station, as shown in the evidence."

"We find from the evidence that by reason of the defendant's refusal to permit the erection and maintenance of the grain house of the complainant upon the right of way of the company and in connection with the side track at said Farwell station the complainant has been compelled to transfer the grain by it offered to the de-



defendant company for transportation from its grain house to its cars by wagon, and that the cost of said transfer from the date of the erection of said warehouse to the present time has been the sum of six hundred ten and 75-100 dollars."

Railroad corporations are quasi public corporations, and enjoy privileges and franchises granted by the state in consideration of the general benefits which the public may be expected to derive from the operations of the roads.

They must, therefore, subject to certain necessary and proper limitations, which the law will recognize, be operated so as to reasonably accommodate the business and subserve the best interests of the public.

One of the most important of these interests in an agricultural community is the marketing and transportation of grain; and the price may in any particular case be affected to a greater or less extent by the facilities for transportation afforded, and the opportunity for competition by purchasers.

It is undoubtedly a subject proper for legislative cognizance. It is an essential condition to the right of eminent domain by a railroad corporation that all the people should have the right to use the road on equal terms; and it is the policy of the law not to permit such corporations to grant special privileges to any persons which are denied to others under like conditions. This is declared by the act of 1887 regulating common carriers and prescribing the duties of the railroad commissioners. Laws 1887, ch. 10, § 2, subd. b.

In our judgment, the following legal conclusion, based upon the facts found in the case, was warranted thereby, and authorized the judgment appealed from: "That the defendant corporation, in refusing the complainant a site for its grain house on defendant's right of way, when the same was demanded by it, while admitting other persons and associations engaged in the prosecution of the same class of business to erect and maintain grain warehouses or elevators on said right of way, as well as in affording them free sidetrack accommodations in connection with such grain houses and elevators, while such privileges were by the defendant denied to the complainant, was and is guilty of unjust and illegal discrimination toward and against said association."

There is no doubt of the good faith of the plaintiff, and the amount

of business transacted by it under unfavorable circumstances shows that there is a public demand for the maintenance of its warehouse. It is entitled to be placed on an equal footing with other dealers and warehousemen at the same station. The discrimination against it appears to be unreasonable, and it was entitled to the relief adjudged in its favor.

It is not claimed by the respondent's counsel that the plaintiff had an absolute right to occupy the defendant's right of way, or to demand a site for a warehouse thereon. The railway company was not obliged to grant such concessions on its right of way. All that is contended for in that regard, and all that was necessarily decided in the case, is that, if it granted these privileges to others, it cannot refuse the same or substantially similar ones to the plaintiff; and it cannot complain, after having refused a site on its right of way similar to that granted to others, that the plaintiff should accept a site adjacent thereto, and demand a side track for its accommodation which the court finds to be a reasonable and proper concession under the circumstances, in order to afford substantially similar facilities to the plaintiff for handling grain to those granted to others at the same station. Undoubtedly the railway company may impose reasonable conditions and terms upon persons who demand trackage for warehouses for the transportation for grain, but they must be the same for all; and the refusal of the company to furnish such trackage at any particular station and within its right of way, so as to allow competition in the handling and transportation of grain, is a proper subject of investigation by the railway and warehouse commission under the act referred to.

It is not deemed necessary to consider other questions raised by counsel in the case, especially in view of recent legislation.

Judgment affirmed.

(Opinion published 56 N. W. Rep. 248.)

SECOND NAT. BANK OF GRAND FORKS *vs.* WILLIAM C. SPROAT.

Argued July 20, 1893. Affirmed Sept. 3, 1893.

No. 8131.

**A. Contract Construed.**

Plaintiff had in its possession collateral security for a debt due from a third party, who also owed the defendant. *Held*, that an agreement by the parties in interest that any sum received upon such collateral security in addition to the indebtedness first secured thereby should be applied on the debt due from defendant operated as an equitable assignment to defendant of such surplus, if any there should be.

**Creditor Holding Chattels as Security—Duty in Selling.**

Where a creditor held as security certain pine logs, which it was agreed that he should manufacture into lumber, dispose of the same, and apply the net proceeds upon the indebtedness so secured, *held* to be the duty of such creditor to use reasonable diligence to secure the best net results, and that it would devolve on him to account for the proceeds, and to show what expenditures were necessarily or reasonably incurred in the management of the trust.

**Immaterial Errors.**

Certain alleged errors *held* without prejudice, in view of the state of the evidence upon the issue in respect to the balance due defendant derived from the collateral security.

Appeal by plaintiff, the Second National Bank of Grand Forks from an order of the District Court of Polk County, *Ira B. Mills, J.*, made September 16, 1892, denying its motion for a new trial.

The defendant, William C. Sproat on January 14, 1887, borrowed of Howes & Dwyer two hundred and fifty dollars and made and delivered to them his promissory note by which he promised to pay that firm or order on June 1, 1887, that amount with interest. Howes & Dwyer on the same day sold and indorsed the note to the plaintiff and waived protest and notice. The bank brought this action thereon to recover the contents.

Defendant answered that on March 28, 1887, Howes & Dwyer were otherwise indebted to the bank about \$1,800, and as security for its payment had delivered to the bank six notes belonging to the firm and also 419,000 feet of pine saw logs on Sandy River in Beltrami County. That on that day, defendant sold and delivered to Howes & Dwyer three hundred and fifty bushels of No.

1 hard Spring wheat and in consideration thereof the firm agreed to pay his note and obtain it from the bank when it fell due, and surrender it to him. It was also agreed orally on that day between the bank, the firm and the defendant that any surplus realized by the bank from the six notes and the sawlogs over the debt for \$1,800, should be applied to pay the note for \$250 given by Sproat. Afterwards, J. W. Howes, one of the firm, gave Sproat a written order to A. W. Clark, the cashier of the bank, as follows:

Grand Forks, May 23, 1887.

A. W. Clark, Cashier;—

Pay to W. C. Sproat a sufficient sum to pay his note endorsed by me, out of collaterals now in your hands over the amount that is required to satisfy your claim.

J. W. Howes.

This order Sproat delivered to the bank. He claims the bank realized out of the notes and sawlogs more than sufficient to pay the \$1,800 and his note for \$250, and that his note is thereby paid. On the trial, the contest was over the question what amount the bank realized out of the sawlogs. It drove them down to St. Hilaire and there had them sawed into lumber. Defendant had a verdict. The plaintiff moved for a new trial. Being denied, it appeals.

*A. C. Wilkinson and Bangs & Fisk*, for appellant.

No evidence was offered by the defendant to prove the amount of the expenses incurred by the bank in converting these logs into lumber and selling the same, or to prove the net receipts from said collaterals, but he was permitted to introduce testimony over plaintiff's objections, tending to show what these expenses would be with the exercise of reasonable diligence, and after showing the gross receipts by plaintiff from these collaterals and the six notes, rested his case. The plaintiff's contention was, and is, that there was no proof of payment as alleged; that to constitute payment there must have been an actual application on the note; that the burden of proof rested with defendant to show that the proceeds of these collaterals were in excess of the Howes & Dwyer indebtedness to the bank, and that in this he wholly failed; that the

actual net proceeds of said collaterals and not what they might have been, should be the basis for computation.

*William Watts*, for respondent.

VANDERBURGH, J. Defendant made the note in suit payable to Howes & Dwyer, who got the same discounted at the plaintiff's bank, and the defendant sold and delivered wheat to the payees, Howes & Dwyer, in consideration of which they were to provide for the payment of the note to the bank; and the defense set up in the answer, in substance, is that the plaintiff bank held certain collateral securities for indebtedness to it of Howes & Dwyer, the surplus proceeds of which over such indebtedness it was mutually agreed should be applied by the bank to the payment of this note, and it is alleged that, after such agreement was made, Howes & Dwyer paid on their indebtedness to the bank \$2,095 by the sale and transfer to it of certain pine logs at that price, and that the plaintiff bank has realized from the collaterals in its possession sufficient to pay the note, which defendant is entitled to have applied in satisfaction thereof. The pleading is loosely drawn, but the purpose of the pleader was evidently to set up an equitable assignment to defendant of the collateral securities in question, subject to the indebtedness of Howes & Dwyer, and to allege that sufficient had been collected applicable to the plaintiff's note in suit to satisfy the same. The plaintiff having delayed making any objection till the trial, every reasonable intendment will be made in support of the sufficiency of the pleading. The decision of the court sustaining it will not now be disturbed.

Upon the trial, however, it turned out that instead of a sale of the pine logs, as alleged in the answer, it had been agreed between Howes & Dwyer and the plaintiff that the logs should be driven down the stream to which they had been hauled, and manufactured into lumber, and the lumber marketed and sold by the plaintiff, and the surplus proceeds over the expenses necessarily incurred should be applied upon their indebtedness to the bank; and the case was tried on that theory, by the consent of all parties, and the variance waived.

It was the duty of the plaintiff to use reasonable diligence in the manufacture and sale of the lumber to secure the best net results,

and it would devolve on it to render an account of its receipts and expenditures, and the burden would, of course, rest upon it to show what expenditures were necessarily or reasonably incurred in the management of the trust. There was no error in the charge on this point. In respect to certain other exceptions, as will appear, the matters practically in issue are brought within so narrow a compass that the alleged errors could not have had any effect upon the result.

The evidence tends to show that the plaintiff received:

As the proceeds of the lumber, the gross sum of....	\$5,507 99
And from the proceeds of the collateral notes, the further sum of.....	821 50

Total .....	\$6,329 49
Indebtedness of Howes & Dwyer to the plaintiff .....	\$1,856 28
Defendant concedes the amount of expenditures by plaintiff, shown by Exhibit E..	2,770 00
Other items of expense established by the evidence .....	647 90
	<u>\$5,274 18</u>

Balance in plaintiff's possession subject to disputed claims testified to by Lander.....	\$1,055 31
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He testified that he paid out in behalf of the bank the amounts appearing upon three pay rolls for labor in manufacturing the lumber, viz. \$267.82, plus \$388.91, plus \$632.34, amounting to \$1,289.07,—more than sufficient to exhaust the above balance. They all rest upon the same evidence, and stand or fall together.

In the light of the cross-examination of Lander, the plaintiff failed to establish that the amount of these pay rolls was a reasonable and proper charge. It does not appear that he had personal knowledge of the fact that the wages claimed to have been paid by him were earned. His evidence was hearsay. The time of the men was kept by another person, and Lander gathered the amount which he says he paid from a book kept by such other person. The case is not helped out by the vague and indefinite evidence of Howes on the matter. It was insufficient to verify the record of the timekeeper or to show how much the men earned, how long they worked, or at what wages they were employed. It is fair to infer that the jury rejected these claims, as they should properly have

done, and they might well scrutinize carefully the account of the plaintiff's expenses as presented by it, in view of the fact that they exceeded in amount all the proceeds of the logs and lumber.

Apart from the pay rolls and the claims for insurance upon the mill, which we think was properly rejected by the trial court, the balance of the account appears to be reasonably established by the evidence, and was presumably allowed by the jury, unless in their judgment, upon the evidence, a reduction of Lander's claim for his personal services was warranted. But it is obvious that it is unnecessary to investigate this claim; for, if the pay rolls were allowed by the jury, the balance in plaintiff's possession, as we have seen, would be thereby exhausted, and if they were disallowed, as we must presume they were, then there was enough to pay all the rest, including defendant's claim, which is all he asks. But we think, upon the evidence, it was fairly a matter for the determination of the jury whether Lander's claim should not have been reduced. The jury could reasonably estimate the time he was employed and the value of his services upon the evidence given upon cross-examination; and this was all the instruction of the court on that question meant, and the jury could hardly understand it otherwise.

Order affirmed.

(Opinion published 56 N. W. Rep. 254.)

55	18
64	345

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WILLIAM E. COVEY *vs.* DWIGHT G. CUTLER *et al.*

Submitted on brief by appellant, argued by respondent, July 18, 1893. Affirmed  
Sept. 8, 1893.

No. 8283.

**An Assignment Passes the Title to Personal Property Wherever  
Situatcd.**

The general rule of law that voluntary conveyances of personal property, valid by the laws of the state where made, pass the title wherever the property may be situated, is applicable to the case of voluntary assignments for the benefit of creditors.

Appeal by defendants, Dwight G. Cutler and Edward A. Gilbert, from an order of the District Court of St. Louis County, *Calvin L.*

*Brown, J.*, made February 27, 1893, denying their motion for a new trial.

Thomas J. Nicol of Duluth being insolvent, on October 7, 1892, made a general assignment under Laws 1881, ch. 148, to the plaintiff, William E. Covey of all his non-exempt property, in trust for the benefit of his creditors. Covey accepted the trust and entered upon the discharge of his duties. Among the property assigned were five hundred and fifty (550) barrels of salt and two hundred and fifty (250) sacks of salt of the value of \$780. This salt was at that time in the freight depot of the Minnesota Eastern Railway Company on the dock in West Superior, Wis., in the charge of S. A. Kemp, the station agent. The defendants resided and were doing business in Duluth, and Nicol was indebted to them \$745.85. On October 17, 1892, they commenced an action on their claim against Nicol in the Circuit Court of Douglas County, Wisconsin, and garnished the Railway Company. They obtained judgment November 11, 1892, and caused the salt to be taken by the sheriff and sold to pay their judgment. At the sale, on December 7, 1892, they bid it in for \$350 and took it away and converted it to their own use. The assignee brought this action to recover of them the value of the salt. They answered, claiming that the assignee never took possession of the salt and that the Minnesota assignment was ineffectual to transfer the title to property in Wisconsin as against the attaching creditors of the assignor. Plaintiff had a verdict for \$881.50. Defendants moved for a new trial. Being denied, they appeal.

*White & Hewit*, for appellant, cited *Jenks v. Ludden*, 34 Minn. 482; *McClure v. Campbell*, 71 Wis. 350; *Barnett v. Kinney*, 147 U. S. 476.

*W. Hammons* and *Toune & Davis*, for respondent, cited *Dehon v. Foster*, 4 Allen 545; *Smith's Appeal*, 104 Pa. St. 381; *Burrill Assignments*, § 102.

**COLLINS, J.** It was held *In re Paige & Sexsmith Lumber Co.*, 31 Minn. 136, (16 N. W. Rep. 700,) to be well established, as a general rule, that a voluntary conveyance of personal property, valid by the laws of the place where it is made, passes the title wher-



ever the property may be situated, and that such transfers, upon principles of comity, will be recognized as effectual in other states, when not opposed to public policy or repugnant to their laws, and also that this principle is applicable to the case of voluntary assignments for the benefit of creditors. The rule thus announced covers the facts in the case at bar exactly. Nothing was said in *Jenks v. Ludden*, 34 Minn. 482, (27 N. W. Rep. 188,) in conflict with these views.

Order affirmed.

(Opinion published 56 N. W. Rep. 255.)

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CHARLES A. STEWART *vs.* REBECCA RAAB *et al.*

Submitted on briefs July 18, 1893. Affirmed Sept. 8, 1893.

No. 8291.

**Effect of a License to Practice Medicine Under Laws 1883, Ch. 125.**

A certificate to practice medicine issued by the board of state examiners, under the conditions of Laws 1883, ch. 125, authorizes the holder to practice the profession in all of its branches.

Appeal by defendants, Rebecca Raab and Jacob B. Raab, her husband, from an order of the District Court of St. Louis County, *Josiah D. Ensign, J.*, made February 8, 1893, denying their motion for a new trial.

Charles A. Stewart was a physician and surgeon practicing his profession at Duluth. He was employed by defendants to visit, treat and perform certain surgical operations upon the wife, Rebecca. They failed to pay his bill and he brought this action against them to recover the amount, \$404. He was a witness in his own behalf and proved the services and their value. He introduced in evidence his certificate issued to him by the State Medical Examining Board on June 30, 1884, authorizing him "to practice medicine in this state," and it was received. Defendants requested the judge to charge the jury that this certificate did not authorize plaintiff to practice surgery. The request was refused and defendants excepted.

The defendants then requested the Judge to charge the jury that Laws 1883, ch. 125, provides for issuing license to practice one branch or more of the profession, and that plaintiff's certificate which authorizes him "to pursue the practice of medicine in this state" is not authority for him to practice surgery. The request was refused and defendants excepted.

The jury returned a verdict for plaintiff for the amount he claimed with interest. Defendants made a bill of exceptions which was approved, signed and filed, and on it they moved for a new trial for error in refusing to charge the jury as requested. The motion was denied and they appeal.

*Lord & Norton*, for appellants.

*Moer, Towne & Harris*, for respondent.

COLLINS, J. Laws 1883, ch. 125, is entitled "An act to regulate the practice of medicine in the state of Minnesota," and the first section prescribes that every person practicing medicine in any of its departments shall possess the qualifications required by the act. To persons possessing these qualifications, certificates shall be issued by a board of examiners, and these certificates authorize the possessors to practice "medicine and surgery" in this state. The terms "practice of medicine," in the title of the act, and "practicing medicine," in its first section, are used in the broad and popular sense in which they are generally understood, applied, and, in fact, defined. One practicing medicine practices "the art of preventing, curing, or alleviating diseases, and remedying as far as possible the results of violence and accident." Therapy is the treatment of disease, and surgery is therapy of a distinctly operative kind. The plaintiff's certificate, in terms, authorized him to pursue the practice of medicine under the conditions of the act of 1883, and necessarily this included surgery. There is nothing whatever in appellants' point that, because surgery was not expressly mentioned in the certificate, plaintiff violated the law when performing surgical operations. The statute in question does not require a license or certificate for each department in medicine.

As the case comes up on a bill of exceptions, we cannot pass on appellants' claim that the evidence did not justify the charge to

the jury that in no event could more than nominal damages be awarded to defendants on their counterclaim.

Order affirmed.

(Opinion published 56 N. W. Rep. 256.)

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GEORGE F. PLYMPTON *vs.* WILLIAM HALL *et al.*

Argued June 21, 1893. Affirmed Sept. 8, 1893.

No. 8150.

**Guardian ad Litem or Next Friend—When Appointed.**

Where persons are incapable of acting for themselves, as in the case of lunatics, they are entitled to the protection of the court, and proceedings will be instituted under its direction. Suit may be brought in their name, and the court will authorize some suitable person to carry it on as next friend or guardian ad litem.

**District Courts may Appoint.**

The power of the District Courts to exercise such authority is not taken away by the provisions of the General Statutes authorizing the Probate Courts to appoint general guardians for insane persons.

**Proceeding is Discretionary.**

But it is in the discretion of the court to allow an action so instituted to proceed or not, and it may order a stay of proceedings to await the due appointment of a general guardian, or order the same to be discontinued, as it may be advised.

Gillfillan, C. J., and Collins, J., dissent on the ground that the insane person is nonresident.

Appeal by defendant, Israel W. Cone, one of the defendants, from an order of the District Court of Hennepin County, *Henry G. Hicks, J.*, made December 1, 1892, denying his motion to dismiss the action.

On June 9, 1891, Andrew S. Keyes presented his petition in the District Court, stating that George F. Plympton of Massachusetts was of unsound mind and had there been adjudged a lunatic and had no general or testamentary guardian in this state. That he owned and was entitled to the possession of lot six (6) in block (20) in St. Anthony, now in the City of Minneapolis. That Israel W.

Cone, William Hall and Charles L. Willard had possession of the lot and were receiving rents for it; that the petitioner was the next friend of the lunatic, and he asked to be appointed his guardian *ad litem* to bring an action of ejectment to recover possession of the property. He was thereupon appointed and commenced this action in the name of Plympton against the three defendants. They answered, denying plaintiff's title and claimed to own the lot under a sale thereof for taxes. On December 1, 1891, they moved the court to dismiss the action on the ground that the court had not acquired jurisdiction of the person or estate of the plaintiff, he being non-resident. The motion was denied, but all proceedings were stayed until a duly authorized guardian of the plaintiff could be appointed by the Probate Court. From that order the defendant Cone appeals.

*Young & Fish*, for appellant.

A guardian *ad litem* is never appointed except for an infant. 1878 G. S. ch. 66, §§ 30, 31; *Clark v. Platt*, 30 Conn. 282.

Our statutes confer upon the Probate Court, as full jurisdiction in the matter of the estates of insane persons as of minors. Probate Code, §§ 142, 152; *State v. Wilcox*, 24 Minn. 143. Where probate jurisdiction remains in the courts of chancery, there may be some color for the claim that they have inherent power to appoint special guardians for insane persons, but here such jurisdiction is vested wholly in the Probate Court, and the general guardian which it alone can appoint, is required to appear for and represent his ward in all legal proceedings except in the cases where a special guardian is provided for by statute. (Probate Code, § 148.) Where such is the law, none but the general guardian can sue in behalf of a lunatic. *Covington v. Neftzger*, 140 Ill. 608; *Gustafson v. Ericksdotter*, 37 Kan. 670.

The action itself, being wholly unauthorized, conferred no jurisdiction and called no powers of the court into action. *Stocking v. Hanson*, 35 Minn. 207.

Want of jurisdiction is not waived by appearance and answer. The statute expressly excepts from the effect of the answer as a waiver the objection to the jurisdiction of the court. 1878 G. S. ch. 66, § 95.

To hold that a party appearing as defendant could, by his appearance, give the court jurisdiction over any one named as plaintiff, without his consent or knowledge, is of course wholly inadmissible.

The objection is not to plaintiff's capacity to sue nor to the authority of the attorney. It is the jurisdiction of the court to proceed in an action to which it affirmatively appears that the plaintiff has in no way consented. If the plaintiff is not in court, then nothing is in court, and no order is proper but an order of dismissal. This is not a question of lack of power to sue, but a lack of any suit. The plaintiff is not here. He could not be bound by any judgment against him, for he is not in court.

*Howard A. Turner and James I. Best, for respondent.*

The defendant, after answering to the merits, cannot raise this question. It comes too late. It should have been done by motion before answering. The answer necessarily concedes that there is a plaintiff properly in court. This precise question was raised and decided adversely to the defendant in *Schuek v. Hagar*, 24 Minn. 339.

All the authorities hold that an insane person, before inquisition found, may bring an action by a guardian or a next friend. *Rock v. Slade*, 7 Dowl. 22; *Nelson v. Duncombe*, 9 Beav. 231; *Light v. Light*, 25 Beav. 248; *Jones v. Lloyd*, L. R. 18 Eq. Cas. 265; *Dorshheimer v. Roorback*, 18 N. J. Eq. 438; *Whetstone v. Whetstone*, 75 Ala. 495; *Newcomb v. Newcomb*, 13 Bush 544; *Chicago & P. R. Co. v. Munger*, 78 Ill. 300; *Allen v. Ransom*, 44 Mo. 263.

If no suit could be commenced in behalf of an insane person until he conferred the authority, none could be commenced, because such person cannot confer such authority. Such suits, however, may be commenced, and the authority to commence them must be conferred by someone who represents him. After appointment, this authority may be said to be with his committee or guardian; but before any appointment, the authority *ex necessitate rei* must be in the court in which the action is commenced. *Denny v. Denny*, 8 Allen, 311.

The defendant contends that the Probate Code invests the general guardian with exclusive authority to commence actions; and

therefore none can be commenced by any other person. The statute does not purport to do anything of the kind, but it leaves this matter precisely as it existed before the adoption of the statute. The only reference to the subject is found in the last clause of section 148 of the Probate Code, which provides that the guardian shall appear and represent his ward in all legal proceedings unless another person is appointed for that purpose. This does not invest him with such authority, but on the contrary is a clear legislative recognition that the courts possess the power to appoint other persons to represent such wards in legal proceedings. All the plaintiff lacked before the commencement of the suit was legal capacity to sue. This was supplied by the appointment of a guardian *ad litem*.

VANDERBURGH, J. In this case the plaintiff, an alleged lunatic, appears and sues by guardian *ad litem*. This appearance by guardian is under the sanction and direction of the court which appointed, as such guardian, on the proper application, a person represented to be the next friend of the lunatic.

Persons incompetent to protect themselves, from age or weakness of mind, are entitled to come under the protection of the court, and proceedings will be instituted under its direction, as was done in this case. *Malin v. Malin*, 2 Johns. Ch. 238; *Denny v. Denny*, 8 Allen, 313.

A lunatic is not supposed to be able, without the assistance of others, to know what steps may be necessary to protect his estate. Suits in his behalf are usually instituted in his name, but as he is a person incapable, in law, of taking any steps on his own account, he sues by the committee of his estate, if any, or, if none, by his next friend, who is responsible for the conduct of the suit. 1 Daniel, Ch. Pr. § 83; Story, Eq. Pl. § 66.

In *Beall v. Smith*, L. R. 9 Ch. App. 91, the general rule in chancery is thus stated: Where there is a person of unsound mind, and therefore incapable of invoking the protection of the court, that protection may be invoked, in proper cases, and to the extent proper in his behalf, by any person, as his next friend. But every person so constituting himself, officiously, the guardian of a person of unsound mind, does so at his own risk, and he must be

prepared to vindicate the propriety of the proceedings, if they are called in question. *Nelson v. Duncombe*, 9 Beav. 231; *Light v. Light*, 25 Beav. 248; *Whetstone v. Whetstone*, 75 Ala. 495.

The remark of the trial judge in *Halfhide v. Robinson*, L. R. 9 Ch. App. 373, that a bill cannot be so filed by a next friend, is not sanctioned by other or later cases. In *Jones v. Lloyd*, L. R. 18 Eq. 275, it is said that everybody knows it takes some time to make a lunatic by inquisition, and his family sometimes hesitate about making him such. Is it to be tolerated that any one may injure him or his property without there being any person to restrain such injury? *Rock v. Slade*, 7 Dowl. 22.

So, in some statutes of limitation, there is no saving clause in favor of lunatics, and in some cases prompt action may be required in instituting an action to save rights which might otherwise be lost. The rule can be no different in actions at law. *Rock v. Slade*, *supra*.

The appellant here concedes that the lunatic may sue, and I suppose whether resident or nonresident, but this necessarily implies that there must be some one to institute and manage the suit, as next friend or guardian.

Again, it is suggested that there is no authority in this state for an appearance of any other guardian for a lunatic than one appointed by the Probate Court, "who shall appear for and represent his ward in all legal proceedings unless another person is appointed for that purpose." Laws 1889, ch. 46, § 148. This provision does not take away the power vested in the court to authorize a next friend to act as guardian *ad litem* for the purposes of a suit, but reserves and saves it. Under a statute substantially similar, in Massachusetts, where the Probate Courts have the exclusive jurisdiction to appoint guardians for the person and estate of lunatics, the Supreme Court sustains this view, and holds that the provisions of the statute do not limit the powers of the court in which an action is brought by or on behalf of a lunatic to appoint a guardian or next friend to appear in his behalf, and approves the doctrine as stated in Story, Eq. Pl. § 66: "Where persons are incapable of acting for themselves, the suit may be brought in their name, and the court will authorize some suitable

person to carry it on as their next friend." Gen. St. Mass. 1860, ch. 109, § 18; *Denny v. Denny*, 8 Allen, 313.

But in every such case it is in the discretion of the court to allow the suit to proceed or not, and it will order a stay of proceedings, or the suit to be discontinued, if it be deemed improper. Story, Eq. Pl. § 66.

So, this suit, to recover real property here, was instituted by the guardian in this case under the direction of the court, and after the answer was served, in the exercise of its discretion, it ordered a stay of the proceedings to await the due appointment of a guardian by the Probate Court. In this there was no error. This court will hardly assume to question the good faith of the guardian, or the propriety of the action of the court in authorizing the institution of the suit by him.

Order affirmed.

GILFILLAN, C. J. I dissent. However it may be in respect to the power of the District Court to appoint a guardian *ad litem* to prosecute an action in behalf of a resident insane person, I do not think it can be done for a nonresident, over whose person the courts of this state have no jurisdiction; and such was this case

COLLINS, J. I concur in the dissenting opinion of the Chief Justice.  
(Opinion published 56 N. W. Rep. 351.)

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JONAS F. BROWN *vs.* SUMNER W. FARNHAM *et al.*

Argued July 10, 1893. Reversed Sept. 15, 1893.

No. 8230.

#### Contracts by Executors.

The general rule is that an executor cannot, by virtue of his general powers as such, make any new contract which will bind the estate, though in form made in his representative capacity. The only effect is to bind himself personally, and it is immaterial how he describes himself.

#### Same—If Authorized by the Will or Otherwise.

Otherwise if the thing promised by an executor is such as he is lawfully authorized or it is his duty to do.

55	27
58	500
55	27
62	469



**Parties to Action upon a Composition Agreement.**

In an action upon a composition agreement, any creditor being a party thereto may bring a several action for his damages for the breach thereof.

**Former Appeal Explained.**

*Brown v. Farnham*, 48 Minn. 317, commented on and explained.

Appeal by plaintiff, James F. Brown, from an order of the District Court of Hennepin County, *Henry G. Hicks, J.*, made March 20, 1893, sustaining a demurrer to his complaint.

The complaint stated that on January 26, 1886, defendant Sumner W. Farnham and James A. Lovejoy were partners in business in Minneapolis under the firm name of Farnham & Lovejoy; that the firm then owed plaintiff \$12,000; that on that day Lovejoy died testate, and that defendants Winthrop Young, O. C. Merriam and Jeremiah J. Howe, were named executors of his will. On March 12, 1886, the will was proved in the Probate Court of Hennepin County, and letters testamentary were issued to the three; they accepted, qualified and proceeded to execute the will; the surviving partner and these executors continued and carried on the partnership business under the old firm name. On October 8, 1887, Farnham and the executors made and delivered to plaintiff a promissory note for the \$12,000 signed with the old firm name of Farnham & Lovejoy, whereby they promised to pay him three months thereafter said sum with interest until paid at the rate of ten per cent. a year. On June 1, 1888, the old firm was indebted to various parties severally, including plaintiff, in the aggregate sum of \$58,583.86, all past due and unsecured. On that day the surviving partner and the executors as party of the first part entered into a composition deed or contract under seal with plaintiff and the other creditors naming them as party of the second part, stating the debt due to each severally and containing a schedule of the partnership property, both real and personal, with the appraised value of each piece and item thereof, aggregating \$84,024.65, and agreeing to grant, assign and set over within thirty days thereafter all said property unto Will L. Wolford therein named as party of the third part, to have and to hold it in trust for the creditors. He was to execute a declaration of trust and was to sell and convert the property into money and pay the proceeds *pro rata* to the creditors with all convenient speed. In

consideration thereof the plaintiff and the other creditors severally thereby agreed to and with the parties of the first part and with each other that they would and thereby did release and forever discharge the firm of Farnham & Lovejoy, and each and all the members of the parties of the first part of and from all the indebtedness therein mentioned, and to accept the conveyance in full satisfaction. Wolford also executed the instrument with the others thereby agreeing to accept and execute the trust.

The complaint further stated that the plaintiff and each of the creditors performed this contract on his part and that Wolford was ready and willing to perform on his part, but that Farnham and the three executors, although often requested, had not conveyed or offered to convey, assign or transfer the property to Wolford, that they had never owned the property and had never been able to convey or transfer any of it, but had refused and had allowed it to be lost, to the damage of plaintiff \$12,000 and interest, for which sum and interest he demanded judgment. A copy of this tripartite contract was attached to and made part of the complaint.

The defendants demurred on the ground that all the creditors should have been joined as plaintiffs and that the complaint did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrers. Plaintiff appeals. He brought a prior action on his note, but was defeated on the ground that it was superseded by the composition deed. *Brown v. Farnham*, 48 Minn. 317.

*Little & Nunn*, for appellant.

Each creditor is interested in this composition agreement to the extent of his particular claim. The damages sustained by each creditor from non-performance are separate and distinct from those sustained by any other creditor. One creditor has no right or interest in the claim of any other creditor. The legal interest of the several creditors in the composition deed, in the subject of the action, in the cause of action, and in the relief sought, is several and they should sue separately. *Goodnight v. Goar*, 30 Ind. 418; *Finney v. Brandt*, 19 Mo. 42; *Weeks v. Love*, 50 N. Y. 568; *Dunham*

*v. Gillis*, 8 Mass. 461; *Pratt v. Pratt*, 22 Minn. 148; *Power v. Hathaway*, 43 Barb. 214; *Best v. Sinz*, 73 Wis. 243; *McNeil v. Masterson*, 79 Tex. 670; *Webber v. Randall*, 89 Mich. 531; *Harvey v. Van Patten*, 87 Iowa —; *State v. Hesselmeyer*, 34 Mo. 76; *Governor v. Webb*, 12 Ga. 189.

The action is not brought against defendants as executors. There is nothing in the complaint to indicate that the contract was made by them as executors. Nor would they have any right or authority as executors to enter into such a contract. They call themselves executors in the contract, but this is simply *descriptio personam*. They make no covenants as executors. But it could in no manner affect the plaintiff's rights had they contracted as executors on behalf of the estate. It is a rule of law, except where changed by statute, that executors are personally liable on their contract, creating obligations after the death of the testator, in all cases except where it is expressly agreed and stipulated in the contract that they shall not be personally liable thereon. If they are not liable, then no one is liable. A party contracting with executors has no claim or right against the estate, but must rely wholly upon the personal liability of the executors. Executors are not agents, nor have the rules of agency any application to executors. They have no principal. Executors and administrators, who have no principal and can have none, are personally bound by their contracts to third parties, even though they assume to contract in their official capacity. *Fitzhugh v. Fitzhugh*, 11 Gratt. 210; *Davis v. French*, 20 Me. 21; *White v. Thompson*, 79 Me. 207; *McFarlin v. Stinson*, 56 Ga. 396; *Merchant's Nat. Bank v. Weeks*, 53 Vt. 115; *Clopton v. Gholson*, 53 Miss. 466; *Studebaker Bros. M'fg Co. v. Montgomery*, 74 Mo. 101; *Kessler v. Hall*, 64 N. C. 60; *Kerchner v. McRae*, 80 N. C. 219; *Long v. Rodman*, 58 Ind. 58; *Moody v. Shaw*, 85 Ind. 88; *Bott v. Barr*, 95 Ind. 243; *Power v. Douglass*, 53 Vt. 471; *Austin v. Monroe*, 47 N. Y. 360; *Schmittler v. Simon*, 101 N. Y. 554; *Kingman v. Soule*, 132 Mass. 285; *Foster v. Young*, 35 Iowa 27; *Holyoke v. Clark*, 54 N. H. 578.

The defendants place great reliance upon the case of *Hayes v. Crane*, 48 Minn. 39. While there are expressions used in the opin-

ion in that case which were unnecessary for the determination of the case and apparently in conflict with many well considered cases, it can in no wise affect the case at bar.

*Jackson & Atwater*, for respondents.

All the creditors who joined in this agreement are necessary parties to an action to determine whether the parties of the first part have made default, and if so, what damages are to be assessed for their default. This conclusion follows, both from the form of the agreement, from the fact that the consideration is joint, from the essential nature of all the provisions as implying a joint contract, and also from the practical difficulties which lie in the way of allowing one creditor to sue alone for a breach of defendants' agreement.

It does not seem possible that defendants can be subject to the recovery of more than one amount of damages for the breach of an agreement like this. They have made but one promise to convey certain property, and the amount of damages they incur if they fail to perform is the value of the property to be divided *pro rata* among the creditors. But if the creditors can sue separately, there may be as many different determinations of the amount of damages as there are different creditors. The case which is the most clearly analogous to the present one is that of *Porter v. Fletcher*, 25 Minn. 493; See also *McLeod v. Snyder*, 110 Mo. 298; *Gallatin & N. Turnpike Co. v. Fry*, 88 Tenn. 296; *Waln v. Cuthbert*, 54 N. J. Law 1; *Hill v. Lewis*, 45 Kan. 162; *Searles v. Reed*, 63 Mich. 485.

The ground of demurrer which is special to Howe, Young and Merriam is, that the complaint does not state a cause of action against them, because it sets up a contract made with them as executors and they are sued as individuals. It is apparent that upon this complaint a judgment could not be rendered against them in their representative capacity, and if the contract was made by them in that character, the complaint is necessarily defective. On this point the appeal seems to us to be determined by the decision in *Hayes v. Crane*, 48 Minn. 39; *Whitney v. Pinney*, 51 Minn. 146.

The plaintiff claims that the executors of Lovejoy had no authority to enter into such a contract as this in their representative

capacity. But there is no allegation of that fact in the complaint, and it assuredly is not a presumption of law. An executor has not only such general powers as are vested in his office by statute and common law, but also the special powers that may be given to him by the will of his testator. Until we know the provisions of the will, it is impossible for the court to say that the contract is unauthorized. It is not unusual for a will to give executors adequate powers to enter into such a contract as this, and when given they are valid. *Willis v. Sharp*, 113 N. Y. 586; 2 Bates Partnership, ch. 2.

And in truth, in view of the prior litigation in this court, we can hardly shut our eyes to the fact that Lovejoy's will did contain full powers on this subject. *Brown v. Morrill*, 45 Minn. 483.

Plaintiff cites a number of authorities to show that every contract by an administrator or executor is his personal agreement. These cases are irrelevant here, because they treat only of acts done without special authority in the will. Furthermore, it is settled by the latest and best authorities that an executor or administrator, even without special authority, may in certain cases bind the estate by his contract. *Fritz v. McGill*, 31 Minn. 536; *Parker v. Maxwell*, 45 Minn. 1; *Whitney v. Pinney*, 51 Minn. 146; *Wakeman v. Paulmier*, 39 N. J. Law 340; *De Valengin's Administrators v. Duffy*, 14 Pet. 282; *Reeve v. Cawley*, 17 N. J. Law, 415; *Stothoff v. Dunham*, 19 N. J. Law, 181; *Mossmun v. Bender*, 80 Mo. 579; *Eagle v. Fox*, 28 Barb. 473.

VANDERBURGH, J. This action is brought upon a composition agreement executed by defendant Farnham, surviving partner of the firm of Farnham & Lovejoy, and the executors of Lovejoy. This agreement was before the court in the case of *Brown v. Farnham*, 48 Minn. 317, (51 N. W. Rep. 377.) It is not, however, set out in the report of the case, and its terms are not specially referred to in the opinion, but it was considered, without much discussion, therein, that this instrument fell within the rule laid down in a class of cases to which belong *Good v. Cheesman*, 2 Barn. & Adol. 828; *Goodrich v. Stanley*, 24 Conn. 613; and *Billings v. Vanderbeck*, 23 Barb. 546,—where the agreement to discharge by the

creditors rests upon the agreement to perform by the debtors, in contradistinction from ordinary cases, in which the composition necessarily involves a settlement by payment of the amount stipulated, its validity being supported by the legal consideration imported by the mutual promises of the creditors. In all cases where the creditors agree with the debtor and with one another to take a less sum than the amount severally due them in discharge of all, or where the discharge is conditioned upon payment or performance, there is no discharge or bar to a suit upon the original debt, unless and until payment is made as required. If the agreement is performed, it is then a valid and final settlement of the debt. In the former class of cases, however, especially where the agreement is to transfer property to creditors in order to effect a settlement, the rule is that "an acceptance, in discharge of a debt, of an agreement, with mutual promises on which the creditor has a legal remedy for its nonperformance, is a satisfaction of the debt, although such promises are not performed." *Goodrich v. Stanley, supra*; Pars. Cont. pt. 12, ch. 3, § 4; 1 Smith, Lead. Cas. (6th Ed.)

444. It is competent for the parties to put their agreement in that form, and their intention, as gathered from its terms, must control.

In the case first mentioned, the attention of the court was more particularly directed to the matter of the consideration in the compromise deed, and the distinction above referred to was not emphasized, though the authorities were referred to.

In the case now before us, the agreement purports to be signed by Farnham, and by the executors of Lovejoy, "as executors," as parties of the first part, by several creditors, as parties of the second part, and by William L. Wolford, as party of the third part. The parties of the first part (defendants here) thereby agree to transfer certain specified real and personal property to Wolford, in trust for the benefit of the creditors named, within thirty days; and, in consideration thereof, the parties of the second part agree to and with the parties of the first part, and with each other, that they, and each of them, will and do thereby release and forever discharge said firm of Farnham & Lovejoy, and each of said firm, and said parties of the first part, of and from any and all of said indebtedness, and from any and all rights of action arising from any of said indebtedness, or the notes or other papers evi-

v.55M.—3

dencing the same, or any part thereof. And although, upon a careful construction of the whole agreement, there may be some doubt about the correctness of the conclusion, it was held that the discharge of the debts referred to depended upon the agreement, and not upon the subsequent performance thereof upon defendants' part; and the question does not arise here, because this action is brought upon the agreement upon the theory that the debts were so discharged, and it is so alleged in the complaint.

The complaint is objected to for defect of parties plaintiff, and by the defendants' executors for insufficiency. The plaintiff's contention is that, upon the face of the agreement, the executors are personally bound, and the complaint is drawn with the view to such relief. On the other hand, the executors insist that the liability against them upon the agreement as exhibited by the complaint is solely in their representative capacity.

We are of the opinion that the complaint does not show a liability against them in their representative capacity. The rule is well settled that an executor cannot, by virtue of his general powers as such, make any new contract for the testator. The only effect of such a contract is to bind himself personally, and it is immaterial how he describes himself, or that he assumes to execute it in his representative capacity. *Sumner v. Williams*, 8 Mass. 162; *Schmittler v. Simon*, 101 N. Y. 554, (5 N. E. Rep. 452); *Pinney v. Johnson's Adm'rs*, 8 Wend. 500; *Austin v. Munro*, 47 N. Y. 366; *McFarlin v. Stinson*, 56 Ga. 396; *Patterson v. Craig*, 1 Baxt. 291.

The general rule is that, upon a promise made after the death of the testator, the executor is chargeable of his own goods; and in contracts for necessary matters relating to the estate he is personally liable, though he may limit his liability to the extent of the assets in his hands. So, if an executor renews a note of the testator, he is personally liable thereon, and must look to the estate for his indemnity if he pay the debt. *Yerger v. Foote*, 48 Miss. 62. And he is so liable upon a bond for a deed, though executed by him as executor. *Patterson v. Craig*, *supra*.

And in respect to an arbitration concerning matters affecting the estate, though there is some difference of opinion on the subject of the power of the executor to submit to arbitration disputed

claims, Mr. Redfield says, (2 Redf. Wills, 294:) "If an executor stipulate generally to pay the amount of an award, he is liable personally."

It is a contract by an executor, and not by the testator, and is subject to the same rules which govern executors generally. *Powers v. Douglas*, 53 Vt. 473.

But if the thing promised by an executor is such as he is lawfully authorized or empowered to do, or if he contracts to do what he has a right or it is his duty to do in his official or representative capacity, then he is not personally bound. *Brown v. Evans*, 15 Kan. 92.

A surviving partner is entitled to settle the affairs of the partnership on the decease of the other members, and is entitled to the possession and disposition of the assets for such purpose, and any real estate belonging to the partnership he is entitled to have so appropriated, and the equitable interest of the firm therein will pass to his assignee. *Hanson v. Metcalf*, 46 Minn. 28, (48 N. W. Rep. 441.)

If, then, the property, real and personal, described in the composition agreement in this case, belonged to the firm of Farnham & Lovejoy, Farnham, as surviving partner, had a right to dispose of it in settling or compounding the debts of the firm, and would only be responsible to the heirs or representatives of Lovejoy for a surplus or an abuse of his power over the estate; and if the title to the partnership real estate stood in the name of Lovejoy or of both partners, and the executors were lawfully empowered to transfer the legal title to the property, or to make a settlement of this character, they might properly join with Farnham in a deed for such purpose in their representative capacity, and they would not be personally bound or liable. The execution of the deed would be merely ancillary to the action of Farnham in the discharge of his duty as surviving partner. But there is nothing in the complaint indicating that the property in question was partnership property, or that the executors had any authority, by will or otherwise, to make deeds or any such disposition of property. On the contrary, the complaint alleges that the defendants have never owned the property, and were never able to convey or assign the same.



There is nothing in the complaint from which the court would be warranted in holding that the contract is not the personal contract of the executors. It was not for the plaintiff to allege in the complaint that the executors did not possess other than general powers as executors, or what was or was not contained in Lovejoy's will on the subject.

The composition agreement discloses on its face the amount of the claim of each creditor, and, though the creditors have a common interest in the fund, yet the interest of each is several, and the damages accruing to each are severable in case of a breach of the agreement. We are unable to see, therefore, why a separate action may not be maintained by one creditor in such case to recover his damages. The action follows the nature of the interest. *Emmeluth v. Home Benefit Association*, 122 N. Y. 134, (25 N. E. Rep. 234,) and cases cited.

We think there was no defect of parties plaintiff in this action.  
Order reversed.

(Opinion published 56 N. W. Rep. 353.)

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### PRINCE INVESTMENT Co. *vs.* DORATHEA EHEIM.

Submitted on briefs July 12, 1893. Affirmed Oct. 10, 1893.

No. 8238.

#### Selection of Additional Lands Granted in Aid of Railroads.

The four additional alternate sections per mile of land granted in aid of railway construction by an act of congress approved May 12, 1864, (13 Stat. ch. 84, § 7, p. 72,) were to be selected in the same manner as were the lieu or indemnity lands provided for in the original land grant act of March 3, 1857.

#### Effect of Withdrawal from Sale of Public Lands.

The voluntary order of the secretary of the interior made soon after the passage of the act of 1864, whereby he reserved and withdrew, as subject to selection under the act, certain lands from sale and entry, vested no rights in the railway company beneficiary inconsistent with the right of a pre-emptor or homesteader to make settlement and entry. The order was revocable, and, in part, would be revoked by allowing a settlement and entry of a certain tract under the pre-emption or homestead laws of the United States.

**The Grant of May 12, 1864, was until Selection a Float Only.**

Until selection was made in the manner prescribed by the act of 1864, the grant of lands was a float only, attaching to no particular tracts.

**Railway cannot Question an Entry Made before Such Selection.**

As the railway company had no vested rights in any particular tract of land until selection, it cannot question the *bona fides* of a prior entry under the pre-emption laws of the United States.

Appeal by plaintiff, the Prince Investment Company, from an order of the District Court of McLeod County, *Francis Cadwell, J.*, made March 21, 1893, sustaining demurrers to its complaint.

On May 12, 1864, the United States owned the southwest quarter of Section thirty-one (31), T. 116, R. 27, in McLeod County. On that day an Act of Congress was approved (13 U. S. Stat. p. 73) granting to the State of Minnesota four additional alternate sections of land per mile for the purpose of aiding in the construction of a railroad from St. Paul to the southern boundary of the State in the direction of the mouth of the Big Sioux River, to be selected within twenty miles of the line of the railroad and upon the same conditions, restrictions and limitations contained in the Act of March 3, 1857 (11 U. S. Stat. p. 195). This grant was accepted by the State March 2, 1865 (Laws 1865, ch. 15) and the lands were granted to and vested in the Minnesota Valley Railroad Company, as fully as the State could then grant the same. In 1870 the name of the Railroad Company was changed to the St. Paul and Sioux City Railroad Company. On July 2, 1864, this land was withdrawn by the United States from sale or entry, and notice thereof sent to the local land office. The line of the railroad was definitely located and map of the route filed August 10, 1865, in the General Land Office. On April 26, 1873, there was filed with the Commissioner of the General Land Office a list of lands selected, including this quarter section, and the list was approved by the Commissioner on May 3, 1873, and by the Secretary of the Interior on May 14, 1873. The lands so selected were on May 21, 1873, certified to the State, and on August 20, 1875, the State conveyed the lands to the Railroad Company and the list was recorded as prescribed by Laws 1875, ch. 97. The Railroad Company conveyed the quarter section to Horace E. Thompson and he conveyed it to the plaintiff.

On June 14, 1864, Patrick McCormick filed in the local Land Office his declaratory statement alleging that he had settled upon this quarter section of land under the preemption laws of the United States. He abandoned it, however, prior to July 2, 1864, and on January 13, 1865, he filed notice of an entry on the land as his homestead under the homestead laws of the United States and on April 1, 1868, he commuted into a location under a military land warrant and on July 16, 1870, he made his proof, and on September 9, 1871, he received a patent therefor in due form.

On March 31, 1871, the Commissioner of the General Land Office on the request of the Railroad Company ordered the Register and Receiver of the Local Land Office at Litchfield to investigate the claim of McCormick. They did so and reported on September 30, 1871, recommending that his entry of this land be cancelled on the ground that he did not settle on the land before it was withdrawn from sale or entry July 2, 1864. The Commissioner of the General Land Office decided on July 27, 1872, that McCormick did not acquire a preemption or homestead right to the land; he appealed, but the decision was on April 18, 1873, affirmed by the Secretary of the Interior and McCormick was ordered to surrender his patent.

The complaint stated these facts and further alleged that the patent to McCormick was invalid because (1) the land had been granted to the State, (2) the land had been withdrawn from sale or entry, (3) the Secretary had decided that his entry was invalid and ordered his patent to be surrendered, (4) the patent was issued by mistake of the clerks in the General Land Office and contrary to law and the rules of the Land Office, (5) that McCormick settled upon the land to sell the same on speculation and not in good faith to appropriate it to his own exclusive use, (6) that his oath on proving his settlement was false in that he had never made any improvement upon the land and had then contracted to sell it and did soon after convey it.

The complaint further stated that the defendant, Dorathea Eheim, is the remote grantee from McCormick of the west half of the quarter section, that the other defendant, Joseph Eheim is her husband, that the land is unoccupied and unimproved and that the defendants and the intermediate grantees all had notice and

knowledge of the facts before purchasing or paying any consideration for the land. The plaintiff prayed judgment that McCormick's patent be cancelled and plaintiff's title confirmed, and that neither of the defendants has any right, title, interest or estate in the land.

The defendants severally demurred to this complaint. The trial court sustained the demurrers and plaintiff appeals.

*Stryker & Moore*, for appellant.

The act of May 12, 1864, was a present grant, its wording being "that there be and is hereby granted." It vested a present title in the State of Minnesota, though a selection of the land granted was necessary to give precision to said title, and attach it to any particular tract. As soon as such selection was made and approved, the grant then became certain, and by relation had the same effect upon the selected parcels as if it had specifically described them. *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733; *Wright v. Roseberry*, 121 U. S. 488; *Schulenberg v. Harri-man*, 21 Wall. 44; *Ryan v. Railroad Company*, 99 U. S. 382; *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. Ry. Co.*, 117 U. S. 406; *Barney v. Winona & St. P. R. Co.*, 117 U. S. 228; *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720; *Wisconsin Central Ry. Co. v. Price Co.*, 133 U. S. 496; *United States v. Missouri, K. & T. Ry. Co.*, 141 U. S. 358; *Desert Salt Co. v. Tarpey*, 142 U. S. 241; *Winona & St. P. R. Co. v. St. Paul & S. C. R. Co.*, 26 Minn. 179; *Winona & St. P. R. Co. v. Randall*, 29 Minn. 283; *Musser v. McRae*, 38 Minn. 408, 44 Minn. 343; *St. Paul & S. C. R. Co. v. Ward*, 47 Minn. 40.

McCormick's entry as well as the patent issued to him are and always have been absolutely void and of no effect whatever, for the simple reason that the land which they covered was at the time they were made reserved from sale or entry by the United States by order of the Secretary of the Interior. The effect of the reservation was wholly to remove the land in question from the control, authority and jurisdiction of the Land Department of the United States. That department was thereafter utterly without power to allow a homestead entry to be filed upon this land or to issue a

patent therefor. If it assumed so to act, its proceedings were contrary to law, and therefore void. *Doolan v. Carr*, 125 U. S. 618; *Steel v. St. Louis Smelt. & R. Co.*, 106 U. S. 447; *Morton v. Nebraska*, 21 Wall. 660; *Reichart v. Felps*, 6 Wall. 160; *Smelting Co. v. Kemp*, 104 U. S. 636; *Mullan v. United States*, 118 U. S. 271; *Colorado Coal & Iron Co. v. United States*, 123 U. S. 307.

The entry and patent were void because made in disregard of the authorized reservations of the land covered by them and because they were made in violation of a statute which expressly forbade them. McCormick's claim was under the preemption laws, and his patent was made in consummation of such claim. His entry of January 15, 1865, could only have been made upon land subject to preemption (U. S. Rev. Stat., § 2289).

The preemption laws provided (U. S. Rev. Stat., § 2258) that the following classes of land, unless otherwise specially provided by law, shall not be subject to the rights of preemption, to-wit: First, lands included in any reservation by any treaty, law or proclamation of the president for any purpose. *Burfenning v. Chicago, St. P. & O. Ry. Co.*, 46 Minn. 20.

*James Schoonmaker, for respondents.*

The equitable actions which an individual may maintain to remove an instrument or other obstruction creating a cloud upon his title, are of two general classes; First, where the instrument complained of is attacked as absolutely void, in which case the relief will be that the instrument be declared null and void, and ordered cancelled; Second where the instrument complained of is attacked as being void as against the rights of the complainant, that is, merely voidable, in which case the relief granted will be either that the instrument is null and void as against complainant, or in a proper case, that the title be held in trust for complainant, and that the same be conveyed to him. *Boggs v. Merced M. Co.*, 14 Cal. 278.

The complaint in this action is framed on both theories. Plaintiff claims the patent is absolutely void by reason of the withdrawal by the Secretary of the Interior, July 2, 1864, and for want of authority in the officers of the government to execute it. Is the

patent absolutely void? This question has been fully determined in the negative by this court in the recent case of *Winona & St. P. Land Co. v. Ebilcisor*, 52 Minn. 312.

The patent is only voidable and not absolutely void. McCormick filed his declaratory statement in due form eighteen days before the withdrawal. He thereafter had thirty days in which to make proper proof and payment for the land before his declaratory statement became outlawed. U. S. Rev. Stat., §§ 2265, 2267. This declaratory statement was never cancelled by the government, or surrendered to the government by McCormick, except so far as it may be considered as having been cancelled and surrendered by McCormick's homestead entry on January 13, 1865, nearly seven months before the map of definite location was filed. The land was not subject to withdrawal, and the attempted withdrawal did not and could not operate on the land. *Northern Pacific Ry. Co. v. Stovenour*, 10 Land Dec. 645; *St. Paul, &c., Ry. Co. v. Ward*, 47 Minn. 40; *Kansas P. Ry. Co. v. Dunmeyer*, 113 U. S. 629; *Hastings & D. Ry. Co. v. Whitney*, 132 U. S. 357; 34 Minn. 538; *Northern Pacific Ry. Co. v. Parker*, 143 U. S. 42; *Bardon v. Northern Pacific Ry. Co.*, 145 U. S. 538.

Even if we treat the attempted withdrawal as a valid executive order, it by no means prevented the government afterwards, and prior to the approval of the selection, from disposing of the land in any way it saw fit. The withdrawal created no right or equity in the railroad company, and was therefore a matter in which that company was not concerned.

If the patent is merely voidable, plaintiff cannot question it. The cause of action attempted to be set out under this theory is either for relief on the ground of fraud, or an action to enforce a trust. It is immaterial in which class it be placed, though it would seem to be an action to enforce that species of implied trusts usually denominated constructive trusts. *Pomeroy Eq. Jur.*, §§ 155, 1030, 1044. Plaintiff's cause of action, if any, accrued not later than the date of the patent, to-wit, September 9, 1871. The present action was commenced March 14, 1893. There are at least four fatal objections to this branch of the complaint: First, If the cause of action be for relief on the ground of fraud, then it is barred

by G. S. ch. 66, § 6, subd. 6. *McMillan v. Cheeney*, 30 Minn. 519: Second, If the action is to enforce a constructive trust, then it is barred by subd. 7 of the same section. *Burk v. Western Land Ass'n*, 40 Minn. 506; Third, Independent of the statute of limitations, plaintiff's delay of over twenty one years in bringing the action is such gross laches that no court will grant relief. Not only is there no excuse for the delay, but the property has also passed to third parties. *Burk v. Western Land Ass'n*, 40 Minn. 506; *Harwood v. Railroad Co.*, 17 Wall. 78; *Landsdale v. Smith*, 106 U. S. 391; *National Bank v. Carpenter*, 101 U. S. 567; *Graham v. Boston H. & E. R. Co.*, 118 U. S. 161; *Spreidel v. Henrici*, 120 U. S. 377; *Bryan v. Kales*, 134 U. S. 126; *Galliher v. Cadwell*, 145 U. S. 368; Fourth, The plaintiff has no superior equity entitling it to question the validity of the patent. The rule is well settled that a patent is not assailable by a private person, except by one having a superior equity. This equity must ante date the patent. *Murphy v. Burk*, 47 Minn. 99; *Minnesota L. & I. Co. v. Davis*, 40 Minn. 455; *Dawson v. Mayall*, 45 Minn. 408; *Hoofnagle v. Anderson*, 7 Wheat. 210; *Smelting Co. v. Kemp*, 104 U. S. 636; *Field v. Seabury*, 19 How. 323; *Sparks v. Pierce*, 115 U. S. 408; *Sioux City, &c., v. Griffey*, 143 U. S. 32.

The land in question being indemnity lands, no right, title or claim thereto accrued in favor of plaintiff's grantor until the selection was made and approved by the Secretary of the Interior on May 14, 1873, which was nearly two years after McCormick's patent was issued; and until that time the government had a perfect right to dispose of the land as it saw fit, and the Railway Company had no right to question such disposal. *Kansas P. R. Co. v. Atchison H. S. F. Co.*, 112 U. S. 414; *St. Paul & S. C. Ry. Co. v. Winona & St. P. Ry. Co.*, 112 U. S. 720, 26 Minn. 179, 27 Minn. 128; *Barney v. Winona & St. P. Ry. Co.*, 117 U. S. 228; *Sioux City Ry. Co. v. Chicago, M. & St. P. Ry. Co.*, 117 U. S. 406; *Wisconsin Cent. Ry. Co. v. Price Co.*, 133 U. S. 496; *United States v. Missouri Ry. Co.*, 141 U. S. 358; *New Orleans P. Ry. Co. v. Parker*, 143 U. S. 42; *Musser v. McRae*, 44 Minn. 344, 38 Minn. 409; *St. Paul & S. C. Ry. Co. v. Ward*, 47 Minn. 40.

COLLINS, J. This was an equitable action brought to have a claim of title to certain real estate, asserted by the defendants, husband and wife, adjudged to be without foundation, and to have a patent deed to said land issued by the United States authorities to one McCormick, said defendants' remote grantor, set aside and canceled, because improperly issued and fraudulently obtained, and also to have plaintiff's alleged title to the premises declared good and valid. The complaint fully stated the facts constituting the claim of each party, and the defendants separately demurred, on two grounds. The demurrers were sustained, on the ground that the complaint did not state facts sufficient to constitute a cause of action, and the arguments here were confined to a discussion of that issue. The plaintiff's title rests upon a deed from a railway company beneficiary, under an act of congress approved May 12, 1864, (13 Stat. ch. 84, p. 72.) By the terms of the seventh section there were granted, in aid of railway construction, "four additional alternate sections of land per mile, to be selected upon the same conditions, restrictions, and limitations" as were contained in the original land-grant act of March 3, 1857. It was also provided that these additional sections were to be located within twenty miles of the line of railway, and it is obvious that they were to be selected and obtained precisely as were lieu or indemnity lands under the original act, and until so selected they were subject to the same conditions, restrictions, and limitations. It is alleged in the complaint that the land in question was reserved and withdrawn by the secretary of the interior from sale and entry on July 2, 1864. Although a map of the final and definite location of the railway was filed August 10, 1865, the list of lands selected in accordance with the provisions of the act of 1864 was not filed until May 3, 1873. This list was approved by the secretary on May 14, 1873. The lands embraced in this list, including the quarter section in controversy, were then certified to the state, and by it conveyed to the railway company.

The law respecting land grants in aid of railways is so well settled that this case is easily disposed of. The railway company could not, and did not, have any vested right in lands to be acquired under the provisions of the statute of 1864 until such lands were actually selected by the secretary of the interior, and evidently



nothing was done in the way of selection until the lists were approved in May, 1873. Until then the right to the additional four sections per mile was a float only, attaching to no particular tracts of land, and in this respect differing not at all from lieu or indemnity lands provided for in the original act of 1857. As no vested right could attach to the place lands (the odd-numbered sections within six miles on each side of the line of railway as definitely fixed) until these sections were actually ascertained and identified by a legal location of the line, so in regard to the four additional sections, which were to be selected within the still larger limit of twenty miles, there could be no ascertainment and identification until a selection thereof was made in the manner prescribed in the granting statute. But it is argued by appellant's counsel that the rights of the railway company upon selection relate back and attach as of July 2, 1864, the day on which, it is alleged, the secretary reserved and withdrew the land from sale and entry. There is nothing in this position. Even if there had been no prior claim upon, or entry of, the quarter section when the order was made, and it had then been open to selection on behalf of the company, such order of reservation and withdrawal would have implied no vested right in the railway company inconsistent with the right of a pre-emptor or homesteader to make settlement and entry. Such entries by actual settlers of lands within the place limits prior to the ascertainment and actual location of the lines of railway were contemplated and provided for in the act of 1857. The granting statute, in some cases, has required the land department to reserve and withdraw from market or entry lands which might become subject to selection, and in others the officers have done so voluntarily, which was the case here; but this is simply to give the railway companies a reasonable time within which to make their selections. They acquire no vested rights by such reservation or withdrawal. It is not until the selection is made that the unascertained float becomes a vested right to an identified tract of land. *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720, (5 Sup. Ct. Rep. 334,) affirming 27 Minn. 128, (6 N. W. Rep. 461.) The voluntary order of the secretary reserving and withdrawing lands from entry or sale which might thereafter be subject to selection created no right or equity in the beneficiary of

the land-grant act, and, exercising the same power or authority which existed to reserve or withdraw the lands, the order might be wholly revoked, or, in part, set aside and disregarded, by an appropriation of a specific tract to some other lawful purpose.

In the case at bar, McCormick filed a declaratory statement under the pre-emption law, June 14, 1864, soon after the enactment of the statute, under which the same tract of land was certified to the state, and by it to the railway company. This was eighteen days prior to the alleged withdrawal and reservation. Final proof was made by the pre-emptor, and a patent was issued to him, bearing date September 9, 1871, about two years before the pretended selection was made in behalf of the railway company. The land had not only been appropriated and patented under the pre-emption laws of the United States when the attempt was made to select it under the provisions of the law of 1864, but it was covered by a declaratory statement, valid on its face, on which the officers of the land department subsequently acted, when the secretary made his order of July 2, 1864. But counsel for appellant attempt to evade the effect and force of the declaratory statement and the patent by alleging that McCormick was not a qualified pre-emptor when he filed the declaratory statement in 1864, and that his final proof was made through fraudulent practices and false oaths. It is also alleged that in 1871 an investigation of the good faith of said McCormick when making the pre-emption was ordered by the officers of the land department, which resulted in a finding by the commissioner of the general land office, subsequently affirmed by the secretary, to the effect that the pre-emption was fraudulent. It also appears that the patent was issued several weeks before the investigation was held. These allegations are of no consequence, for, if true, they do not tend to establish plaintiff's title to the land. To the contrary, they show that the railway company could not acquire title to the land under the terms of the land-grant acts upon which it must rely. The right of the railway company to the additional four sections per mile did not attach to any particular tracts until selections were made, as before stated, and at that time McCormick held a patent for the land, based upon a declaratory statement, valid upon its face, filed prior to the alleged withdrawal and reservation from sale and

entry. The land had been otherwise appropriated by the United States when the railway company attempted to secure it through selection. As before stated, the railway company had no vested rights in this or any other particular tract of land until it made its selection, and consequently McCormick's alleged fraudulent acts were no fraud upon it. The general government only, having the right to otherwise dispose of the land pending a selection, can question the *bona fides* of the McCormick entry. Order affirmed.

(Opinion published 56 N. W. Rep. 239.)

Application for reargument denied November 2, 1893.

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HERBERT NASH vs. ELIZABETH W. ADAMS *et al.*

Argued July 5, 1893. Affirmed Oct. 10, 1893.

Nos. 8197 and 8198.

**A Stipulation Construed.**

A certain stipulation, entered into between the plaintiff in an action to foreclose a mortgage on real property and defendants S. and P. as copartners, who had alleged in their answer a prior and superior lien upon the premises by virtue of the mechanics' lien law, and the pendency of an action against the mortgagor owner to foreclose the same, that judgment might be entered as against the mortgagor alone, and the entry of judgment thereon. *Held* not to have had the effect of a dismissal or discontinuance of the action as against the answering defendants S. and P.

**Statement of Facts Showing a Matter to be Res Adjudicata.**

Subsequent to this stipulation, the S. S. & D. Co., a corporation, also a defendant, and a party to the stipulation, commenced an action to foreclose a claim under the mechanics' lien law, the mortgagor, the mortgagee, and S. and P. being defendants. The mortgagee, plaintiff herein, wholly defaulted, and S. and P. failed to answer. Judgment was duly entered determining that the lien claim of plaintiff corporation was prior and superior to that of the mortgagee but co-ordinate with that held by S. and P. The mortgagee then appealed to this court, but the judgment was affirmed. He then moved the court below to vacate and set aside those portions of its findings of fact and conclusions of law which authorized that part of the judgment which determined the lien claims to be co-ordinate. The motion was denied. Later the mortgagee redeemed from a sale of

the premises made by the corporation to satisfy its judgment, and on the trial of this action relied on this redemption as evidence of his title. *Held*, that the mortgagee, this plaintiff, is concluded by that part of the judgment which in effect subordinated his mortgage to the lien claim of S. and P.

**A Mortgagee's Right to Redeem from Prior Liens not Foreclosed.**

S. and P. prosecuted their action against the mortgagor to a final judgment, and sold the premises in satisfaction thereof, becoming the purchasers at the sale. *Held*, that in none of the proceedings before mentioned has there been set in motion the period of time within which the present plaintiff as mortgagee has the right to redeem the premises from the sale to S. and P.

Appeal by plaintiff, Herbert Nash, from a judgment of the District Court of Hennepin County, *William Lochren*, J., entered March 9, 1893. Appeal also by defendants, Charles A. Smith and John S. Pillsbury from the same judgment.

On October 15, 1888, defendant Elizabeth W. Adams, owned lot four (4) in block one (1) in L. & R.'s subdivisions of Lawrence & Reeve's Out lots in Minneapolis, and had made a contract a few days before with B. W. Kiernan to build a dwelling house on it for her. On that day the defendants, Charles A. Smith and John S. Pillsbury, partners doing business under the firm name of C. A. Smith & Co., sold and delivered to Kiernan on the premises lumber and materials for the house of the value of \$405.49 and afterwards filed a lien therefor. The defendant the State Sash & Door Manufacturing Company, a corporation, also furnished about the same time materials for the house of the value of \$182.32, and afterwards filed a lien therefor. Several other parties either performed labor or furnished materials for Kiernan in building the house and filed liens thereon.

On November 5, 1888, Mrs. Adams executed a mortgage on the lot to Edward Russell for \$1,600. This mortgage was recorded November 8, 1888, in the Registry of Deeds. Russel assigned this mortgage to the plaintiff and he began an action in the District Court on August 23, 1889, to foreclose it, making the mortgagor and all the lienors parties defendants. They appeared and answered, setting forth their liens. On November 8, 1889, the parties to that foreclosure suit stipulated in writing and filed it in court, that judgment be entered for the relief prayed, but that it should contain no provision or clause making the mortgage prior or superior

in any way to the liens of the defendants, but that the judgment should be entered the same as if the lienors were not made defendants in that action. Judgment was entered on this stipulation November 23, 1889, and the property was sold under it by the sheriff on June 6, 1892, to the plaintiff for \$2,203.63 and the sale was confirmed June 18, 1892. Mrs. Adams meantime on March 7, 1891, surrendered possession of the property to the plaintiff and on July 30, 1892, she executed and delivered to the plaintiff a quitclaim deed of the lot.

Charles A. Smith and John S. Pillsbury commenced an action in 1889 to foreclose their lien. They made the owner, Mrs. Adams, the contractor Kiernan and most of the other lien claimants defendants, but they omitted to make State Sash & Door Manufacturing Company and the assignee of the mortgage parties to the action. They obtained judgment January 7, 1890, against Kiernan for their claim, interest and costs, amounting to \$448.89 and adjudging it a lien on the property and directing it to be sold to pay the same. The property was sold by the Sheriff February 24, 1890, under this judgment to Smith and Pillsbury for \$480.98, and on March 7, 1890, this sale was confirmed. No redemption was made from this sale and on August 8, 1891, a final decree was rendered adjudging Smith and Pillsbury to be the owners of the property as against the defendants in that action and all parties claiming under them subsequent to the commencement thereof.

On February 27, 1890, the State Sash & Door Manufacturing Company began an action in the District Court to foreclose its lien. The owner, Mrs. Adams, the contractor Kiernan, the assignee of the mortgage Nash, and all the lien claimants including Smith and Pillsbury were made defendants and were duly served. Judgment was entered December 19, 1890, adjudging due the corporation \$315.65 and directing the property to be sold by the Sheriff to pay it, that it was co-ordinate with the judgment in favor of Smith and Pillsbury and that both were superior to the mortgage. On appeal this judgment was affirmed in this court. *State S. & D. Mfg Co. v. Adams*, 47 Minn. 399. The assignee of the mortgage then moved the court to amend the findings and judgment, but was refused. The property was then sold by the Sheriff under this judgment and the sale was confirmed April 4, 1891. Nash,

the assignee of the mortgage, duly redeemed April 5, 1892, from this sale as a creditor, having a subsequent lien paying \$377.28 and receiving the Sheriff's certificate of redemption.

On August 4, 1892, Nash commenced this action to determine all adverse claims and made defendants all the parties above mentioned. The facts above recited were shown in evidence. The court made findings and ordered judgment that as to the defendants Smith and Pillsbury the plaintiff take nothing. As to all the other defendants that plaintiff was entitled to judgment that he is owner of the property and that they have no interest in it. Judgment was so entered and both plaintiff and the defendants Smith and Pillsbury appeal.

*Fred W. Reed*, for plaintiff.

*Ueland & Holt*, for C. A. Smith & Co.

**COLLINS, J.** This was an action brought to determine adverse claims to a city lot. The findings of fact made in the court below stand unquestioned on appeal from a judgment entered in accordance with the order of the court that defendants Smith and Pillsbury, copartners as C. A. Smith & Co., recover their costs and disbursements from the plaintiff, and that as to the other defendants he have the relief demanded. Plaintiff and defendants Smith and Pillsbury, copartners, both appeal from this judgment the latter claiming that the court should have adjudged them to be tenants in common with plaintiff. The case is really quite simple, although from the many facts involved it would appear to be much complicated. March 8, 1891, the year expired within which Adams, as the owner, had the right to redeem from the sale to Smith and Pillsbury. The former, having failed to redeem, was then divested of all title to the premises, while the latter became the owners in fee as of October 15, 1888, subject, however, to the undetermined rights and interests of Nash, the mortgagee, and the State S. & D. Co., material men. As neither of these persons had been brought into the action in which C. A. Smith & Co. were plaintiffs, their rights and interests had not been affected or adjudicated. But in the month of August, 1889, the present plaintiff commenced an action to foreclose his mortgage, in which Smith and Pillsbury, as partners, and the State S. & D. Co., were made defendants, it being alleged

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in the complaint that each had, or claimed to have, some title or interest in and to the mortgaged premises, and that such title or interest was inferior and subordinate to plaintiff's mortgage. To this complaint Smith and Pillsbury answered, setting up their lien and proceedings thereon, including the commencement and pendency of the lien foreclosure action, and expressly putting in issue plaintiff's allegation that their own title or claim to the premises was inferior and subordinate to plaintiff's mortgage. In this answer it was distinctly averred that the first item of material had been furnished by C. A. Smith & Co. on October 15, 1888, several days prior to the execution and delivery of the mortgage. We are not advised as to whether plaintiff replied to the answer, but on November 8, 1889, there was a stipulation filed, which had been signed by the attorneys of all parties to the action except Adams, the mortgagor, that judgment of foreclosure might at once be entered against Adams, as demanded in the complaint, but without reference to either of the other defendants, and so that it should not affect the priority of the lien claims as asserted by them. Judgment was so entered, no reference being made to the other defendants or to their claims, November 27, 1889.

From the findings of fact herein it does not appear that any of the issues raised by the answer of C. A. Smith & Co. in the mortgage foreclosure action have ever been determined by the court, or otherwise disposed of. Again, in the action brought February 27, 1890, by the State S. & D. Co. to foreclose its lien, the respective rights and interests of the plaintiff corporation, lien claimant, Nash, the mortgagee, Adams, the owner, and C. A. Smith & Co., lien claimants, were brought in question by an allegation in the complaint that the defendants Nash, Adams, Smith, and Pillsbury had, or claimed to have, some claim or interest in the involved premises, but said claim or interest was inferior to that of the plaintiff corporation. The court found the lien of the State S. & D. Co., plaintiff, superior to the mortgage. It found the facts with reference to the lien claimed by C. A. Smith & Co., and that an action of foreclosure had been brought by that firm; that a judgment had been rendered, and a sale of the premises had, whereby the lien claim of C. A. Smith & Co. had been satisfied. Among other conclusions of law was one that the lien claims of the plaintiff corporation and said C. A. Smith

& Co. were co-ordinate. On these findings judgment was entered, and in accordance therewith, as before stated, December 19, 1890. This was about one year after plaintiff Nash had caused judgment to be entered in his mortgage foreclosure action against the mortgagor only. It is urged by appellant Nash that, as he defaulted in the State S. & D. Co. lien action, having wholly failed to appear, he is not bound by that part of the judgment which determined that the liens of C. A. Smith & Co. and the State S. & D. Co. were co-ordinate, the point being that the rank of these two lien claims could not be and was not brought in question by the complaint, nor was it in issue in the action, as C. A. Smith & Co. failed to answer. We are not obliged to discuss this claim, for Nash, although in default in the action, appeared subsequent to the rendition of judgment by appealing therefrom to this court. The judgment was affirmed, and, whether right or wrong, concluded appellant upon every point determined. Afterwards he moved the court below to vacate and set aside that part of the findings and of the judgment which passed upon and determined in respect to the lien claim of C. A. Smith & Co. The court denied the motion. No appeal was taken, and the time for appealing had expired when this action was begun. Later plaintiff availed himself of the right of redemption provided for in this judgment, and in the present action relied on the redemption made as evidence of his title to the property. In his mortgage foreclosure proceedings Nash had before this temporarily abandoned the prosecution of his assertion that the mortgage lien was superior to that of the defendants material men. He had also taken an appeal from the judgment which expressly fixed the rank of the respective liens, but failed to overturn the judgment in any of its features, or even to secure a modification. Finally, he redeemed from a sale made on the judgment, and in this action asserts an interest acquired thereby. His claim through redemption proceedings is no other or different than that which would have been held by the State S. & D. Co. had no redemption been made. He is concluded by every part of the judgment, as are all other parties thereto. By it the amount then due to C. A. Smith & Co. was determined; and it was also decreed, in effect, that their lien claim was prior, and therefore superior, to plaintiff's mortgage. As between the parties, these questions are at rest as fully as are those



respecting the amount due to, and the relative position of the claim of, the State S. & D. Co. Here the judgment stopped, however. In none of the proceedings has the plaintiff been deprived of his right to redeem from the lien held by C. A. Smith & Co. There has been no foreclosure of their lien as to him, for nowhere has there been even an attempt to set in motion the period of time within which he has a right to redeem from the sale made to Smith and Pillsbury. This might easily have been done in their action to foreclose by making Nash a defendant, but it was not. It might have, and probably would have, been done in the plaintiff's action to foreclose his mortgage had the respective rights of all parties been determined therein, as invited by plaintiff's complaint. Of course, the period of time within which Nash would have to redeem from the sale could be fixed in the present action, its express purpose being to determine the nature and extent of the adverse claim to the premises made by Smith and Pillsbury. But, undoubtedly, the court below was of the opinion when making its order for judgment that as to the persons last named, defendants therein, the foreclosure proceedings are still pending and undetermined; and that, until the questions raised by the Smith and Pillsbury answer were determined, an action of this character would not lie. We agree with the learned trial court that the stipulation entered into by the attorneys for the respective parties to the foreclosure proceedings and the judgment entered thereafter, solely against Adams, did not have the effect of discontinuing the action as to the remaining defendants, or of determining the same one way or the other. The language of the stipulation clearly indicates that the issues raised in that proceeding by the answers of the defendants, namely, the rank, relatively, of the liens asserted by the plaintiff as mortgagee and the defendants as material men, and the rights of the various lienors to redeem, one from the other, were to be left open for future disposal. The judgment was strictly in accordance with the stipulation. The questions which plaintiff Nash attempted to litigate in the present action are either disposed of by the judgment in favor of the State S. & D. Co. or are still in issue in his foreclosure action, and must there be determined. Although unnecessary, perhaps, it is well to say at this time that a supplemental answer embracing allegations of the new facts should be filed by Smith and Pillsbury be-

fore they proceed to trial, for since they answered the year within which Adams had to redeem has expired, and the judgment entered in the other action has disposed of some of the issues. Judgment affirmed.

(Opinion published 56 N. W. Rep. 241.)

Application for reargument denied October 23, 1893.

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DOUD, SONS & CO. *vs.* DULUTH MILLING CO.

Argued Oct. 11, 1893. Decided Oct. 16, 1893.

No. 8383.

55	53
77	276
77	277

**Anticipated Profits Cannot be Recovered as Damages.**

The complaint in this action contained an allegation that defendant had violated the terms of a contract between them, and that by reason thereof plaintiff was entitled to recover damages for anticipated profits. *Held*, that the terms of such contract did not authorize the recovery of such damages. *Held*, also, that the allegation upon this point in the plaintiff's complaint was immaterial, and that the judgment of the court below for the amount inserted in its judgment as damages for anticipated profits was unauthorized and void.

**A Failure to Answer Admits only Facts Properly Pleased.**

*Held*, further, that defendant's omission to answer or appear was only an admission of the facts properly pleaded.

**Complaint Construed.**

The complaint contained one good cause of action,—\$1,157.38. Judgment modified.

Appeal by defendant, the Duluth Milling Company, a corporation, from a judgment of the District Court of St. Louis County, *J. D. Ensign, J.*, entered December 15, 1892, against it for \$7,062.18.

The plaintiff, Doud, Sons & Co., a corporation, on May 2, 1891, entered into a contract with defendant to build cooper shops and make barrels therein for it for one year from January 1, 1892. Defendant then contemplated constructing a large flouring mill on Lot 4, Sec. 10, T. 48, R. 15, on the Wisconsin side of the St. Louis River and the cooper shops were to be built there. The plaintiff ex-

pended \$1,157.38 in laying foundations and doing work upon the shops. The defendant then abandoned the enterprise and stopped the work. This action was brought to recover the money so expended and also damages for breach of the contract. The complaint stated that the capacity of the mill was to be 3,000 barrels of flour per day; that defendant would have required at least 344,400 barrels during the year and that plaintiff was to make and furnish all the barrels used; that it would have realized a net profit of two cents on each barrel and at least \$6,888 during the year. The plaintiff demanded judgment for the money it had expended and also for these anticipated profits. A copy of the contract was attached to the complaint but it contained no statement as to the capacity of the mill or as to the number of barrels it would take of the plaintiff. The defendant did not answer. The plaintiff made proof of the service of the summons and of defendant's default and submitted its evidence to the court and obtained findings of fact and a direction for the entry of judgment against defendant for the full amount claimed in its complaint. The clerk entered judgment accordingly. The defendant on June 15, 1892, appeared and filed bond for costs and served notice of appeal to this court.

*McKusick & Grannis*, for appellant.

An appeal lies from a judgment entered upon the default of the defendant. As to the right of appeal, there is no distinction between a default judgment and one rendered after issue joined and trial had. *Reynolds v. La Crosse & Minn. P. Co.*, 10 Minn. 178; *Hallock v. Jaudin*, 34 Cal. 167.

The default of the defendant in not answering the complaint was only a confession of the averments properly pleaded; it was an admission only of the material allegations of the complaint. *Unfried v. Heberer*, 63 Ind. 67; *Compton v. Pruitt*, 88 Ind. 171; *Cook v. Skelton*, 20 Ill. 107; *Bates v. Loomis*, 5 Wend. 134; *Welch v. Wadsworth*, 30 Conn. 149; *Burlington & M. R. R. Co. v. Shaw*, 5 Iowa, 463. The admission is limited to a confession of the facts properly alleged and cannot be extended by intendment or inference. *Chicago & N. W. Ry. Co. v. Coss*, 73 Ill. 394; *Hollis v. Richardson*, 13 Gray, 392; *Board of Supervisors v. Smith*, 95 Ill. 328; *Thighen v. Mundine*, 24 Tex. 282; *Abbe v. Marr*, 14 Cal. 210.

Anticipated profits are not an element of damages on breach of contract. *Hadley v. Bazendale*, 9 Exch. 341; *Mississippi & R. R. Boom Co. v. Prince*, 34 Minn. 71; *Beaupre v. Pacific & Atl. Tel. Co.*, 21 Minn. 155; *Paine v. Sherwood*, 21 Minn. 225; *Frohreich v. Gammon*, 28 Minn. 476; *Simmer v. City of St. Paul*, 23 Minn. 408; *Griffin v. Colver*, 16 N. Y. 489; *Howe Machine Co. v. Bryson*, 44 Iowa, 159; *Petrie v. Lane*, 67 Mich. 454; *Howe Machine Co. v. Bronson*, 44 Iowa, 159; *Howard v. Stillwell, etc., Manufg Co.*, 139 U. S. 199; *Pennypacker v. Jones*, 106 Pa. St. 237; *McKinnon v. McEwan*, 48 Mich. 106.

*John A. Keyes*, for respondent.

Where the objection that the complaint is insufficient is first made on appeal, a liberal construction will be placed upon the allegations. Any facts reasonably inferable from those pleaded, will be held to have been alleged. *McArdle v. McArdle*, 12 Minn. 98; *Smith v. Dennett*, 15 Minn. 81; *Holmes v. Campbell*, 12 Minn. 221; *Drake v. Barton*, 18 Minn. 462; *Solomon v. Vinson*, 31 Minn. 205; *Frankoviz v. Smith*, 34 Minn. 403; *Trebbv v. Simmons*, 38 Minn. 508.

The damages recovered resulted directly from the breach of the contract and the profits to accrue from its performance were considered in the contract, and were the only inducement and consideration for its being entered into. The profits were the very things that were stipulated for, otherwise the plaintiff would not have expended its money. Had the defendant expected to pay no profits to plaintiff it would not have required plaintiff to agree to keep it supplied with barrels. *Morrison v. Lovejoy*, 6 Minn. 319; *Lovejoy v. Morrison*, 10 Minn. 136; *Goebel v. Hough*, 26 Minn. 252; *Mississippi & R. R. Boom Co. v. Prince*, 34 Minn. 71; *Ennis v. Buckeye Pub. Co.*, 44 Minn. 105; *Beyerstedt v. Winona Mill Co.*, 49 Minn. 1; *Fairchild v. Rogers*, 32 Minn. 269; *O'Connell v. Hotel Co.*, 90 Cal. 515; *Treat v. Hiles*, 81 Wis. 280; *Corbett v. Anderson*, 85 Wis. 218; *Brown v. Hadley*, 43 Kan. 267.

Buck, J. This action was brought in the district court of St. Louis county to recover damages for alleged breach of a contract entered into between the parties May 2, 1891.

One of the alleged causes of action is for money expended and labor performed pursuant to the terms of a written contract, which is made a part of the complaint. It is conceded by the counsel for the appellant that this court cannot disturb the judgment of the court below, to the amount of \$1,157.38, rendered for such money expended and labor performed by plaintiff for the defendant by virtue of the terms of their contract. But the plaintiff seeks to recover as damages a large sum, in the nature of anticipated profits, for nonperformance by the defendant of the terms of said contract, and did so recover in the court below; the total judgment there rendered upon both of the alleged causes of action being the sum of damages, \$7,045.38, and costs taxed \$16.80; total judgment, \$7,062.18,—of which amount, \$1,157.38 was for money expended and labor performed. The controversy is over the damages claimed for anticipated profits. The court below allowed this claim, and the amount so allowed forms a part of the judgment above described.

The appellant insists that this was error, upon the ground that such damages were too remote, speculative, and uncertain, and did not constitute the basis of a legal claim, and that, by the very terms of the contract, no such damages were contemplated by the parties at the time of its execution. In this view of the case, we agree with the appellant. It did not answer or appear in the court below, and contest the allegations of the complaint, nor was it bound to do so. It had a right to rely upon the protection of the court below, to the extent that such court would not render a judgment against defendant upon insufficient averments or immaterial allegations in the complaint. The law does not permit immaterial allegations in a complaint to be used as a basis for rendering a judgment against the defendant. The allegation of material facts, or the omission of them, in a complaint, constitutes a guide for the defendant, in determining whether he will answer, appear, or suffer default.

If there is no answer or appearance, then there are no issues to be tried, and the court simply hears the evidence upon the proper allegations in the complaint, where application is necessary, as in this case. But the defendant makes no admission, by suffering default, as against insufficient allegations in the plaintiff's complaint. It is the duty of the court hearing the evidence, in such cases of default, to receive only such testimony as conforms to the material

allegations of the complaint. In this respect the court below erred. We do not think that we need to enter into an extended discussion of the question of remote or speculative damages, or those based upon anticipated profit, for the contract between the parties clearly shows that no such damages were contemplated by the parties at the time of its execution.

As the contract was made a part of the complaint, its terms would control any inconsistent allegations inserted in the complaint by the plaintiff; and it appears from the express terms in the contract that defendant only agreed to take such amount of barrels manufactured by plaintiff as defendant needed for its use in its flour mill. The capacity of the flour mill is not stated or agreed upon by the terms of the contract. In the absence of any such agreement, the defendant had the right to judge of the number of barrels it needed for its use, and not the plaintiff. That the defendant did not receive or pay for any barrels under the terms of the contract is conceded, but, that plaintiff did not realize any anticipated profits thereby, does not constitute a right on the part of this plaintiff to recover damages of the defendant. By reason of the error of the court below in this respect, the judgment of the district court must be modified, and allowed to stand only for the sum of \$1,157.38, and the taxed costs of that court.

This case is remanded to the court below, and said court is directed to modify said judgment in accordance with the views herein expressed.

Note. Appellant's costs in this court having been taxed, it was on November 9, 1893, ordered, on the respondent's motion, that appellant's judgment for costs be set off against an equal amount of the respondent's recovery of damages.

(Opinion published 56 N. W. Rep. 468.)

ISAAC O. SORENSON *vs.* PETER P. SWENSEN.

Submitted on briefs Oct. 6, 1898. Affirmed Oct. 16, 1898.

No. 8443.

**Entry of Judgment "Forthwith" in Justice's Court.**

Where, in a justice court, a verdict was returned between the hours of noon and 1 o'clock P. M., August 20, 1892, at which time the justice was engaged in hearing other cases, and therefore did not render judgment on such verdict until August 22, 1892,—the intervening day being Sunday,—*held* that the judgment was rendered in due time, under 1878 G. S. ch. 65, § 68, requiring a judgment to be rendered by the justice forthwith upon the return of a verdict, and that the word "forthwith," as used in said statute, means that such judgment shall be rendered by the justice within a reasonable time, having due regard to the circumstances surrounding the case before him.

Appeal by defendant, Peter P. Swensen, from a judgment of the District Court of Hennepin County, *Frederick Hooker, J.*, entered May 12, 1893, against him for \$105.71 damages and costs.

*C. E. Brame*, for appellant.

The justice lost jurisdiction to enter judgment two days after the jury brought in their verdict. Our statute is like that of New York, Wisconsin, Ohio, Iowa, Nebraska and numerous other states. It requires that on receipt of the verdict by the justice, where a jury trial is had, he shall forthwith render judgment and enter the same in his docket. (1878 G. S. ch. 65, § 68.) *McNamara v. Spees*, 25 Wis. 539; *Wearne v. Smith*, 32 Wis. 412; *Hull v. Mallory*, 56 Wis. 355; *Bissell v. Bissell*, 11 Barb. 96; *Hull v. Malony*, 10 Iowa, 389; *Watson v. Davis*, 19 Wend. 371.

This statute is mandatory and not directory and if the justice could delay the rendition and entry of judgment two days he could delay it to an indefinite period. *Stolt v. Chicago, M. & St. P. Ry. Co.*, 49 Minn. 353; *Craighead v. Martin*, 25 Minn. 41.

In certain cases, our statute, like that of many other states, limits the justice to so many days in which to enter judgment in his docket after the case has been submitted to him for his decision, and wherever the courts have had occasion to pass on this statute they have

universally held that it is mandatory, and if a justice enters judgment after the time limited by statute, it is a void judgment. *State ex rel. v. Whittet*, 61 Wis. 351; *Sibley v. Howard*, 3 Denio, 72.

*Merrick & Merrick*, for respondent.

The supreme court of Iowa in *Burchett v. Cassady*, 18 Iowa, 342, has construed the word "forthwith" to mean "in a reasonable time," and sustained a judgment entered on Monday where the confession was filed Saturday evening. This seems to us not only the better construction, but more in consonance with sound reasoning and justice. *Wearne v. Smith*, 32 Wis. 412; *Hall v. Tuttle*, 6 Hill, 38; *Tomlinson v. Litze*, 82 Iowa, 32; *McNamara v. Spees*, 25 Wis. 539.

BUCK, J. This case comes here upon an appeal from a judgment of the District Court of Hennepin county affirming a judgment of a justice court in said county. The principal question involved, and the only one which we deem it necessary to consider, is whether, upon the return of the verdict in the justice court, the justice forthwith rendered judgment, and entered the same in his docket. To fully understand this legal question raised by the appellant we quote a portion of the return of the justice, which is as follows: "Jury returned a verdict for plaintiff for nineteen and two one-hundredths dollars (\$19.02) damages, and cost of suit, between the hours of 12 M. and 1 P. M., August 20, 1892, whereupon judgment was entered in favor of plaintiff, and against the defendant, for nineteen and two one-hundredths dollars (\$19.02) damages, and costs, taxed at sixty-seven and sixty-eight one-hundredths dollars, (\$67.68;) total, eighty-six and seventy one-hundredths dollars, (\$86.70.) Said judgment was not written up till August 22, 1892, as the court was engaged in other cases, and could not write it up sooner. Dated August 22, 1892. Elijah Barton, Justice of the Peace."

The contention of the appellant is that upon the return of the verdict the justice should have rendered his judgment thereon instantly, and entered the same in his docket, and that, not having done so until August 22d, he lost jurisdiction of the case; and to sustain this position he cites 1878 G. S. ch. 65, § 68, which is as follows: "In cases where the plaintiff is nonsuited or withdraws his action or where judgment is confessed and in all cases where a ver-



dict is rendered the justice shall forthwith render judgment and enter the same in his docket."

The 21st day of August, 1892, was Sunday. Of this fact the court will take judicial notice. Under the laws of this state, no one of the courts is allowed to be open on Sunday for the purpose of rendering judgments. The act of the justice in writing up the judgment was performed on the first court day after the return of the verdict. There are several cases decided by the Supreme Court of Wisconsin where it was held, in construing a statute like ours, that upon the return of the verdict the justice must render judgment upon the same instantly. The Supreme Court of Iowa held to the contrary in the case of *Burchett v. Casady*, 18 Iowa, 344, where it is decided that the word "forthwith," in such a statute, means within a reasonable time. We think that the ends of justice will be better subserved by a liberal and equitable construction of the law and practice relating to justice courts than by the adoption of a harsh and unbending rule of strict construction. We therefore hold that the word "forthwith," in the section of our statute quoted, means, as there used, that the judgment must be rendered within a reasonable time after the return of the verdict. What constitutes such reasonable time will depend on the circumstances surrounding each particular case. There should be no unreasonable delay. In this case it appears that at the time of the return of the verdict the justice was engaged in hearing other cases, and was thereby prevented from rendering his judgment sooner. That he used reasonable diligence and exertion in the performance of his duty seems unquestionable, and the judgment of the District Court is affirmed.

(Opinion published 56 N. W. Rep. 350.)

61  
243  
55 98

## PER JOHANSON vs. FRANK HOWELLS.

Submitted on briefs Oct. 10, 1893. Affirmed Oct. 16, 1893.

No. 8491.

**Facts Stated. Proximate Cause.**

One J. owned a colt, which he kept in his pasture, inclosed with a fence, and forming part thereof was a post from three to five feet high, quite sharp on top, placed there by J. himself. At the same time one H. owned a colt, which he permitted to run at large, and which ran along the side of the said fence of J., and his colt, seeing the colt of H., ran towards it, and, the two colts meeting at this post, one upon each side of the fence, they both reared up, and remained in this position only a moment, when they both came down, and, as they did so, the colt of J. fell upon this sharp post, and thereby received such an injury that it died within an hour. It did not appear that the colt of H. was trespassing upon the premises of J. at the time of the injury, or that the colt of H. was of a mischievous or vicious disposition. *Held*, that J. could not recover of H. any damages, not even nominal damages, for the injury to J.'s colt.

Appeal by plaintiff, Per Johanson, from an order of the District Court of Traverse County, *C. L. Brown, J.*, made August 27, 1892, denying his motion for a new trial.

*E. T. Young*, for appellant.

*Reynolds & Townsend*, for respondent.

BUCK, J. On the 23d day of April, 1892, plaintiff owned a horse colt, of the value of \$150, which he kept in his pasture, inclosed by a fence, in which fence, and forming a part thereof, was a post, somewhere from three to five feet high. This post was quite sharp on the top, and was there erected by the plaintiff himself. On the day above stated, this defendant owned several horses and a colt, which were running at large in the vicinity of the plaintiff's pasture; upon whose land it does not appear, and this fact is immaterial in the view we take of this case, except it appears quite conclusively that, at the time of the injury complained of, the defendant's animals were not trespassing upon the plaintiff's land. The plaintiff claims that

the defendant's colt, while so running at large, came up to the pasture fence of plaintiff where his colt was inclosed, and attempted to and did bite, annoy, and harass his colt, whereby said colt was excited and frightened, and thereby jumped, and fell against and upon a post, whereby it was cut, wounded, and killed.

The cause came on for trial before a jury, and, when the plaintiff rested, the court below dismissed the case, upon motion of defendant, because the plaintiff had failed to prove a cause of action. A witness for the plaintiff, and whose testimony was uncontradicted, testified as follows: "I saw the colt at the time the accident occurred. They [Howells' colts] were running from the other side of the creek,—the west side,—and they came alongside of the fence down to my place, and then they turned again, and went up the other way where Johanson's colt was. Then one of the colts went up to Johanson's colt, and they both raised right up on their hind legs, one on each side of the fence, and they stayed there for about a second, and then they both came down, and Mr. Johanson's colt, I suppose, came down on that sharp post, and I seen him when he came down. He started down the pasture, and kind of staggered, and I sent my boy over to tell Johanson that his colt was hurt. Then I went back to my plow again. About an hour after that Mr. Johanson came around, and I went down with him where the colt was, and when I got there the colt was dead." The plaintiff's evidence was substantially the same.

There is not anything in the case to show that the defendant's colt was vicious, or of a mischievous disposition. The colts were not fighting, and the injury to plaintiff's colt was not the result of any biting, kicking, or pushing or other vicious act on the part of the defendant's colt. The proximate cause of the death of the colt was not any act on the part of the colt of the defendant. It was an accident or disaster, which happened without cause or design on the part of the defendant, and it was one of those unforeseen events for which he is not legally responsible. Under no aspect of this case can the plaintiff recover, and we need not determine whether the plaintiff was guilty of contributory negligence in erecting in his pasture fence a post such as is described in the evidence. The claim of the plaintiff that he was entitled to nominal damages is

untenable. The animals of defendant were not trespassing upon his premises.

The order of the court below denying plaintiff's motion for a new trial is affirmed.

(Opinion published 56 N. W. Rep. 460.)

Application for reargument denied November 1, 1893.

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JOHN DELUDE vs. ST. PAUL CITY RY. Co.

Argued Oct. 5, 1893. Affirmed Oct. 18, 1893.

No. 8368.

55	63
67	67
55	63
81	184

**Notice or knowledge a question for the jury.**

Where an employe was injured while coupling cars, by reason of alleged defects in the coupling apparatus, *held* that, under the evidence, the question whether he knew of such defects, or was reasonably chargeable with notice thereof, was a question for the jury.

**Employe may assume the machinery to be in good repair.**

In the absence of such notice, the employe has a right to assume that the master had used due diligence to keep dangerous machinery or appliances in good order and in a safe condition.

**Questions for the jury.**

Certain other questions of fact, involving the alleged negligence of the parties, *held* properly submitted to the jury.

**Reasonable care in an emergency.**

Where a party who handles dangerous machinery is called upon to act suddenly or in an emergency, that fact may become material, and be considered in connection with others, in determining the question of notice and reasonable care.

**Joint negligence of master and a fellow servant.**

Where the negligence of the master combines with that of a fellow servant, so as to contribute to the injury of another servant, the master is liable.

**Exception too general.**

Where, of several requests to charge, some are given, and others satisfactorily covered by the general charge, and others are not given, a

general exception, without calling the attention of the court to the particular omission complained of, is unavailing on appeal.

**Damages not excessive.**

Damages *held* not so large as to warrant the interference of this court.

Appeal by defendant, the St. Paul City Railway Company, from an order of the District Court of Ramsey County, *Chas. D. Kerr, J.*, made June 29, 1893, denying its motion for a new trial.

On October 23, 1891, the plaintiff, John Delude, was in the service of the defendant as conductor upon its Selby Avenue Cable line in St. Paul. At six o'clock in the morning of that day he took a grip-car and trailer, from the power house at Dale Street, and went east to the end of the line at Broadway and then back to the west end of the line, just beyond Milton Street. This suburban cross street is in low ground so that gravity will move the cars to it from either direction. Here the cars are switched over onto the southern track and coupled for the return trip east to Broadway again. While plaintiff was coupling the trailer to the gripcar on the south track at Milton Street the draw bar of the gripcar failed to strike the draw head of the trailer, but slipped by and allowed the cars to come together. Plaintiff's left leg was caught between the opposite stay-chain coupling hooks and was seriously injured. He made his report of the casualty, as follows;

"After setting brake on coach at the switch I got between cars to couple. Drawbar being turned out I tried to pull it back, in so doing my leg (left) stood against the hook when the grip came crashing into the coach, the hook from the grip smashing my leg.

"JOHN DELUDE."

Subsequently on November 25, 1891, he made a verified claim for damages and presented it to the company. In it he described the occurrence, as follows;

"The coach was standing, and in my position as conductor, it was my duty to make the coupling of the same to the grip car. I had set the coach brake, and stood in front of the coach so as to make the coupling when the grip car and coach came together. When the grip car came back and struck the coach it was with such force that the drawbars were forced to one side owing to the side springs or guides for holding the draft irons in position, being broken. The

cars were forced closer together than at any time previous, which caused the stay-chain coupling hooks to catch my left leg between them, jamming it above the knee."

At the close of the evidence the defendant submitted five several requests to charge. The judge gave the first in terms and embodied the last three substantially in the general charge to the jury. The defendant then stated to the court as follows; "To the refusal of the court to give each instruction asked by the defendant we desire to except." The second request was as follows;

"The plaintiff on entering the employment of the defendant assumed the ordinary risks incident to such employment, including the negligence of a co-employee, and if the jury find that the appliances in and about the train upon which plaintiff was employed were in a reasonably safe condition for the purpose for which they were intended, then your verdict must be for the defendant."

The jury returned a verdict for the plaintiff and assessed his damages at \$2,750. The defendant made a case and it was settled, signed and filed. On it and the pleadings, verdict and files, defendant moved for a new trial. Being denied, it appeals. In this court there was no disagreement between counsel as to the law or its application, but the discussion was principally upon the evidence, whether it justified the verdict. Defendant claimed, that, measured by the standard of duty imposed on it by law, the evidence failed to show that it was negligent in the premises.

*McCafferty & Noyes*, for appellant.

*James E. Markham*, for respondent.

VANDERBURGH, J. This is a personal injury case. The plaintiff, an employe of the defendant, was injured while coupling cars. These cars were operated upon a cable line in the city of St. Paul, and consisted of a grip car and a coach. At the time in question the cars had arrived at Milton street, near the western terminus of the line, to and from which street the grade of the track rises in either direction. At this point the cars are switched upon a parallel track, and the train made up for the return trip, and the usual procedure was followed in this instance. The grip car was uncoupled and switched over to that track, and pulled east beyond the switch, so as to allow the coach to be switched over to the same

track, in order that it might be coupled to the rear or west end of this grip car. When the coach was transferred, it was suffered to run down the grade across Milton street, and up to the proper point, when the brake was set by the conductor, who was the plaintiff in this case, and thereupon the grip car was allowed by the employe in charge to run back to the coach where the conductor stood, ready to couple them when they came together. This was done by inserting a coupling pin in the coupling apparatus, which consisted of a drawbar attached to and projecting beyond the platform of the grip car, and a drawhead in like manner attached to the coach. There also projected from the platforms of each car, opposite to each other, hooks for stay chains. The drawhead and the drawbar operated to keep the cars from coming together further than necessary to couple them, and constituted the only obstacle to prevent the two platforms from striking each other. When they were in order, and in a right line with the cars, and properly united by the coupling pin, there was an open space of eight inches between the extremities of the stay hooks.

The drawhead and drawbar referred to each rested on a broad steel spring, fastened at each end to wooden framework, constituting the edge of the platform, and they were so attached to the cars as to allow a lateral movement on this spring each way of six or seven inches, so as to permit the apparatus to adjust itself to curves in the track.

The evidence also tends to show that on each side of the drawbar of the grip car, and under the platform, there had been constructed two lateral springs for the purpose of holding the drawbar in place in a central position, and which would at the same time allow the necessary lateral movement under pressure. It is obvious that if these springs were in place and operative, and the cars were coupled on a straight track, under the circumstances admitted to have existed in this case, the cars would not be brought nearer together in the act of coupling than above indicated.

On the occasion in question here the plaintiff set the brake in the usual way on the coach, passed through, and took his position between it and the grip car as it approached, for the purpose of making the coupling. His evidence shows that the drawhead of the coach was turned one side, and that he reached over and drew it

towards him to its proper position in the center, and then attempted to make the coupling, but, when the drawhead and the drawbar came together, the effect was to turn them both towards the other side of the track, and the result was to bring the cars together, and plaintiff's leg was caught between the stay hooks, and injured; and hence this action for damages. The plaintiff was required to act promptly, owing to the near approach of the grip car when he arrived at the front end of the coach, and, according to his testimony, he was not aware that the coupling apparatus was out of repair or unsafe.

After the accident, on the same day, he discovered that the lateral springs which were required to hold the drawbar in place were broken or missing. There is also evidence tending to show that a spring upon which the drawhead of the coach rested, called in the testimony an "elliptical spring," was also bent down, which affected its position, and hindered him in making the coupling. There is also evidence sufficient to sustain the finding of the jury that the grip car was out of repair, as above described, on the night before the accident; and that it was the duty of defendant's servants to inspect and repair the same before sending it out on the track again, and which they failed to do; and that the defect complained of was the cause of, or essentially contributed to produce, the accident.

These questions were properly submitted to the jury by the court, upon the evidence. The court correctly charged the jury, in substance, that the plaintiff, in the absence of notice to the contrary, or the existence of facts sufficient to charge him with notice, might assume that the defendant had used reasonable care and diligence to keep these appliances in good order and in a safe condition; and it was a question for the jury, considering the circumstances under which he was required to act in making the coupling, to determine whether he knew of or was negligent in not observing the defects complained of.

And so also as respects the contention of the defendant that the accident resulted from the alleged careless and reckless speed with which the grip car was backed down against the coach. As to the facts, the plaintiff and the "gripman" both testify to the contrary, and that it was handled in the usual way, and with prudence and care. It is true there are some statements and admissions in



the plaintiff's report of the accident to the company, made on the same day, which tend to support the claim of the defendant touching this matter. But they are not conclusive, but, with plaintiff's explanations and testimony on the trial, were properly submitted to the jury. They will be again referred to.

It is also contended by the defendant that the plaintiff was negligent in taking the position he did between the cars, and it is claimed that with reasonable care he might have avoided the danger consistently with his duty in undertaking to couple the cars. This question was contested by the parties upon the trial, and there was considerable evidence on both sides in direct conflict on the subject; so that the question was fairly for the jury, and the court was right in holding that it did not indisputably and conclusively appear that the plaintiff was negligent in the premises. It is unnecessary to make special reference to the evidence.

There is no exception to the charge of the court to the jury, but merely to the refusal of the court to give certain requests asked by the defendant; but, of the five requests made, the first was given as requested, and the others, except perhaps the second, were fairly covered by the general charge; and, in view of the instructions actually given, it is evident that the single general exception taken by the defendant to the court's disposition of these requests was not sufficient to direct the attention of the court to the point in the second request now specially insisted on by the defendant, and which refers "to the risk assumed by the plaintiff of the negligent conduct of a coemployee." We may infer that, if the attention of the court had been called to this point, it would have given the appropriate instruction.

It is assumed by the defendant that the accident was caused by the fact that the grip car was permitted to strike the coach with such violence as to force the cars together. This the gripman in charge and the plaintiff both deny, and the claim is predicated upon the admission of the plaintiff in his statement to the company above referred to, as follows: "When the grip car came back and struck the coach, it was with such force that the drawbars were forced to one side;" but he says in the immediate connection with the foregoing: "Owing to the *side springs* or guides for holding the draft irons in position *being broken*," and "the cars were forced closer to-

gether than at any time previous, which caused the stay chain hooks to catch my leg between them, jamming it above the knee." It will be observed that the plaintiff claims here also that the absence of the "side springs or guides" was the cause of the accident, which the jury, under the instruction of the court, must have found to be true. We doubt, therefore, if, in any view of the case, the omission to give this request was prejudicial, because it is well settled that if the negligence of the master combines with that of a fellow servant, and the two contribute to the injury of another servant, the master is liable. *Franklin v. Winona & St. P. R. Co.*, 37 Minn. 409, (34 N. W. Rep. 898.)

The case appears to have been carefully tried, and it was fairly and impartially presented to the jury by the court in its charge. The trial court, which was necessarily more familiar with the merits, was of the opinion that the verdict was not unreasonable in amount, and we do not think it so large as to warrant this court to set it aside as excessive.

Order affirmed.

(Opinion published 56 N. W. Rep. 461.)

ALBERT C. MIDDELSTADT vs. JAMES MCINTYRE.

Submitted on briefs Oct. 3, 1893. Reversed Oct. 18, 1893.

No. 8308.

**Practice in Justice's Court.**

In Justice's Court practice it is error for the Justice to dismiss an action for defects in the complaint without first ordering an amendment of the pleading.

Appeal by plaintiff, Albert C. Middlestadt, from a judgment of the District Court of Hennepin County, *William Lochren, J.*, entered January 18, 1893.

On October 11, 1892, plaintiff commenced this action in a Justice's Court in Minneapolis against defendant, James McIntyre, to recover \$10.88 which he claimed defendant had received from Hall & Ducey

Lumber Co. for plaintiff's use and benefit. On the return day, October 19, 1892, defendant appeared and moved to dismiss the action on the ground that the complaint did not state facts sufficient to constitute a cause of action. The motion was granted and judgment rendered in favor of defendant for \$2 costs.

Plaintiff appealed to the District Court on questions of law alone. After argument, the judgment of the Justice was there affirmed with costs, \$14.23. From that judgment plaintiff took this appeal.

*A. C. Middlestadt, pro se.*

*McHale & Abell, for respondent.*

VANDERBURGH, J. This action was brought in Justice's Court. A complaint in writing was filed with the Justice, and, before answering, the defendant appeared, and moved to dismiss the action, on the ground that the complaint did not state facts sufficient to constitute a cause of action, which motion was summarily granted, and judgment was thereupon rendered for the defendant.

The granting of this motion is assigned as error, on the ground that the procedure was unauthorized by the statute regulating the practice in Justice's Court.

We think the point is well taken. The statute (1878 G. S. ch. 65, § 33) provides that "either party may object to the pleading of his adversary \* \* \* that it contains no cause of action or defense. If the court deems the objection well founded, it shall order the pleading to be amended." The court had no authority to order or render judgment without directing an amendment as the statute requires. The pleading was clearly bad, but it was the duty of the Justice, in his order disposing of defendant's objection to it, to order it to be amended. This was the only course open to him under the statute, the object of which is undoubtedly to prevent the summary disposition of cases in justice's court for defects in pleading without opportunity for amendment and a trial upon the merits. *Hilliard v. Austin*, 17 Barb. 141. Here the case was within the jurisdiction of the Justice, and we should hardly be warranted in holding that the complaint could not be amended, by the addition or substitution of allegations, so as to state a cause of action. *Glasse v. Keulsen*, 3 Abb. Pr. 101.

For the error referred to, the judgment must be reversed, but no costs should be allowed in this court.

Judgment reversed, and case remanded.

(Opinion published 56 N. W. Rep. 464.)

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59 211

LONDON & NORTHWEST AMERICAN MORTGAGE CO. *vs.* JOHN  
FITZGERALD *et al.*

Argued Oct. 9, 1893. Affirmed Oct. 18, 1893.

No. 8158.

**A surety will not be subrogated, to the prejudice of the creditor.**

The right of a creditor to retain a pledge or mortgage security for his benefit until the indebtedness secured thereby is paid in full is superior to the equity of a surety who has paid a part only of such debt.

**This principle applied to the facts in this action.**

And, where a mortgage is given to secure several notes, a surety upon one note is not entitled to subrogation until all the notes are paid.

Appeal by defendants, David L. How and others, from an order of the District Court of Ramsey County, *James J. Egan, J.*, made December 5, 1892, denying their motion for a new trial.

The plaintiff, the London and Northwest American Mortgage Company (Limited), a British Corporation, brought this action at law upon a promissory note made by defendant, John Fitzgerald, March 12, 1887, for \$1,550 and interest due two years after its date and indorsed by defendant How and eight others. At maturity the note was presented for payment, but was not paid and was protested for nonpayment and notice given the indorsers.

How and the other indorsers by their answer admitted all the allegations in the complaint, but alleged that on March 12, 1887, they jointly owned Block one (1) in Oakview Addition to South St. Paul and sold and conveyed it on that day to Fitzgerald. That to secure a part of the purchase price Fitzgerald gave to them the note in suit and another note for a like amount and interest, due one year after its date. That Fitzgerald secured the payment of both

notes by a mortgage to them on the block. That they thereafter indorsed the note in suit and sold both notes to the plaintiff and assigned to it the mortgage. That no part of the \$3,100 principal had been paid, but the interest had been paid on both notes to March 12, 1890. They offered to pay this note in suit if plaintiff would assign to them a half interest in the mortgage, and they demanded judgment permitting them to pay the note in suit and directing plaintiff to deliver it to them and to assign to them an undivided half interest in the mortgage.

At the trial these allegations of the answer were admitted to be true and on this statement, the case was submitted for determination. The Court afterwards on September 16, 1892, filed findings of the facts as above stated, and directed that plaintiff have judgment for the amount of the note in suit; that the mortgage stand as security for the payment to plaintiff of the other note in full; and that only after both notes are paid will defendants be entitled to the mortgage security for the part paid by them.

Defendants moved for a new trial on the ground that the decision was contrary to law. The motion was denied and they appeal.

*William G. White and Southworth & Collier, for appellants.*

Upon payment by defendants of the note in suit, they will be entitled to that note and also, as that note represents just one-half of the debt secured by the mortgage, they will be entitled to one-half interest in the mortgage. The fact that the other note first matured, gives it no superior right in the security. *Wilson v. Eigenbrodt*, 30 Minn. 4; *Hall v. McCormick*, 31 Minn. 280. The right of subrogation applies where the surety pays a part of the secured debt, as well as where he pays it all. *Dick v. Moon*, 26 Minn. 309.

When a defendant desires to be subrogated to the rights of the plaintiff in a security for the debt, he may in his answer allege the facts, and the Court may require the plaintiff to execute and file a transfer of the security to be delivered on payment of the judgment. *Knoblauch v. Foglesong*, 37 Minn. 320; *Barton v. Moore*, 45 Minn. 98.

*James H. Foote, for respondent.*

In the absence of contract the law implies the right in the creditor to hold all his security till the whole sum advanced is paid.

1 Story Eq. J. § 502a; *Farebrother v. Wodehouse*, 23 Beav. 18; *Williams v. Owen*, 13 Simons, 597; *Harlan v. Sweeny*, 1 Lea, 682; *Swan v. Patterson*, 7 Md. 164; *Union Bank of Maryland v. Edwards*, 1 Gill & J. 346.

The right of subrogation cannot be enforced until the whole of the debt is paid. Until the creditor is wholly satisfied there ought to be no interference with his rights or his securities which might, even by bare possibility, prejudice or embarrass him in any way in the collection of his claim. *New Jersey, &c., R. Co. v. Wortendyke*, 27 N. J. Eq. 658; *Kyner v. Kyner*, 6 Watts, 221; *Gannett v. Blodgett*, 39 N. H. 150; *Neptune Ins. Co. v. Dorsey*, 3 Md. Ch. 334; *Groce v. Brien*, 1 Md. 438; *Zook v. Clemmer*, 44 Ind. 15; *Rice v. Morris*, 82 Ind. 204; *Rooker v. Benson*, 83 Ind. 250; *Phenix Ins. Co. v. First National Bank*, 85 Va. 765.

Subrogation is purely an equitable right and the Court ought to deny it in all cases where its exercise would work injustice. *Stamford Bank v. Benedict*, 15 Conn. 437; *Magee v. Leggett*, 48 Miss. 139; *Hollinsworth v. Floyd*, 2 Harr. & G. 87; *Gannett v. Blodgett*, 39 N. H. 150; *Belcher v. Hartford Bank*, 15 Conn. 381; *Union Bank of Md. v. Edwards*, 1 Gill & J. 346; *Kyner v. Kyner*, 6 Watts, 221.

No doubt the defendants, upon paying the amount of the note sued on, would have an equitable interest in the mortgage security, but it would be an interest which must wait until the entire claim of the plaintiff is satisfied. If plaintiff should foreclose the mortgage and the proceeds of the sale should more than pay the other note, the defendants would be entitled to the surplus. *Solberg v. Wright*, 33 Minn. 224.

VANDEBURGH, J. Defendant Fitzgerald executed two notes, for \$1,550 each, to his codefendants, as payees, which notes are secured by mortgage. Before maturity the payees sold and indorsed the notes, and assigned the mortgage to the plaintiff. One of the notes, being the note in suit, was protested for nonpayment, and the indorsers duly charged as such. In this action upon that note, the defendants, (indorsers,) in their answer, ask that, as a condition of the payment thereof by them, the plaintiff should be required to transfer to them the note, and assign to them a proportionate in-

terest in the mortgage security, it being admitted that the other note is still outstanding and unpaid. The relief asked by the defendants was denied by the court, except upon the condition that the subrogation in their favor should be subject to and subordinate to the rights of the plaintiff in the mortgage as security for the remaining note.

The mortgage is security for both notes, but the plaintiff, the assignee thereof, and the owner of the notes, will not be treated as trustee of a proportionate interest therein for the benefit of sureties who may pay part of the debt only. Their indorsement is additional security, but the holder of the mortgage is not obliged to part with his security, or any part of it, until the whole indebtedness secured thereby is paid. Their rights to the security are subordinate to his.

Had the mortgage been given to secure notes held by different parties, or had one note been transferred to a purchaser without reserving any preference in the security, the cases cited by the appellant would be in point. But since the claim of a surety to subrogation is purely an equitable one, and does not rest upon any contract, it cannot prevail, unless it is shown to be just and reasonable; that is to say, a surety can only be substituted in the place of the creditor upon equitable conditions. Hence it is obvious that the court will not interfere, as against the principal creditor, to compel him to surrender any part of the property or security pledged for his benefit, until the whole of the indebtedness for which it is so pledged is paid. To do so would be a clear violation of his rights under the contract by virtue of or under which he holds the security. *Wilcox v. Bank*, 7 Allen, 272, and cases cited. And it is entirely immaterial whether there be one or more separate debts, or whether, where there are several debts, they are secured by the same or different sureties, for the object of the pledge or mortgage is the protection of the holder in respect to each and all of the several debts which it was given to secure. If, then, the answering defendants desire to secure the benefit of the mortgage in question, they must first pay the amount due upon both notes, when they will be entitled to be substituted in the place of the plaintiff, and to enforce the mortgage for their own benefit.

This case is distinguishable from that of *Nettleton v. Ramsey Co.*

*L. & L. Co.*, 54 Minn. 395, (56 N. W. Rep. 128,) for reasons stated in the opinion in that case, in which the objection was urged by the principal debtor, whose obligation to pay the whole amount of several debts was absolute, and collateral securities were not involved.

Order affirmed.

(Opinion published 56 N. W. Rep. 464.)

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GILLETTE-HERZOG MANUFACTURING Co. *vs.* R. W. ASHTON.

Submitted on briefs Oct. 10, 1893. Affirmed Oct. 18, 1893.

No. 8154.

**Double time for service under 1878 G. S. ch. 66, § 76.**

Where a complaint is served by mail after a seasonable demand by the defendant, the latter has double time to answer; and, if judgment is prematurely entered, he has an absolute right to have it set aside.

**Rules of court may be suspended.**

Rules of court in respect to the hearing of motions may, in the discretion of the court, be suspended by it in any particular case; and if the questions involved are rightly determined, after legal notice, this court will not reverse by reason of a technical departure from such rules.

Appeal by plaintiff, Gillette-Herzog Manufacturing Company, a domestic corporation, from an order of the District Court of Hennepin County, *Thomas Canty, J.*, made January 24, 1893.

Action against defendant, R. W. Ashton, to recover \$63.16, balance of an account for goods sold and delivered. The Summons was personally served on November 22, 1892, by the Sheriff of Pipestone County. Defendant employed Janes & Cady of Pipestone to defend and they on December 1, 1892, served by mail notice of retainer and demand of a copy of the complaint. On December 5, 1892, the plaintiff's attorney, James A. Kellogg of Minneapolis, served by mail a copy of the complaint. On December 16, 1892, defendant's attorney served by mail a copy of the answer, (1878 G. S. ch. 66, § 76.) It was received the next day by plaintiff's attorney and he at once returned it by mail, as not served in time and caused judgment to be entered that day for the plaintiff for the amount claimed with disburse-



ments. This was done on an affidavit that no answer or demurrer or copy of either had been received by its attorney.

On January 6, 1893, the defendant on affidavits of these facts, the answer and an affidavit of merits, obtained an order that plaintiff's proceedings on the judgment be stayed and that it show cause on January 21, 1893, why the judgment and all proceedings under it should not be vacated, the copy answer stand served and the place of trial changed to Pipestone County, where defendant resided. At the hearing on the return day plaintiff objected that by Rule 2 of the District Court of Hennepin County the order should have been accompanied by a notice of motion setting forth the grounds on which defendant sought relief. The trial court disregarded the objection and granted the relief asked. Plaintiff appeals.

*Kellogg & Laybourn*, for appellant.

*Jones & Cady* and *F. L. Jones*, for respondent.

**VANDEBURGH, J.** The defendant appeared and demanded a copy of the complaint, which was served by mail on the 5th day of December, 1892. The service by mail gave the defendant double the time he would otherwise have been entitled to in which to answer.

Judgment by default was prematurely entered by plaintiff on December 16, 1892; and the answer received by mail on December 17th was refused and returned by plaintiff, on the sole ground indorsed thereon,—that the same was not served in time. The defendant had an absolute right to have the judgment set aside, because the time for answering had not expired. He accordingly applied to the District Court of Hennepin county, upon affidavit setting forth the facts, and procured a stay of proceedings, with an order to show cause why the judgment should not be set aside, procured on January 6, and returnable January 21, 1893. Upon the hearing, the relief sought was granted.

There is no doubt that the merits of the application are fairly disclosed by the affidavit and order, and that defendant was shown to be justly entitled to such relief. The plaintiff, however, seasonably objected to the form of the application, on the ground that the rules of the District Court of Hennepin county were not complied with in making the same. These provided that an order to show cause must be accompanied by a notice of motion setting forth the

grounds thereof, and that an order to show cause should not be granted when a motion can be made in the ordinary form upon notice. Such rules are very proper for courts to adopt for the orderly discharge of business; and if the court had sustained the objection, and refused the application without prejudice, this court would doubtless not have interfered. But, in its discretion, the court saw fit to suspend their operation in this particular instance, and dispose of the application on its merits. It was competent for the court to do this, *Nye v. Swan*, 42 Minn. 245, (44 N. W. Rep. 9;) and as the case was rightly determined on the merits, after due notice to the plaintiff and opportunity to be heard, the order appealed from should be affirmed.

(Opinion published 56 N. W. Rep. 576.)

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**R. A. COSTELLO vs. WALTER C. DOHERTY *et al.***

Argued Oct. 11, 1893. Affirmed Oct. 20, 1893.

No. 5452.

**Contractor's bond under the city charter of Duluth.**

Under the charter of Duluth, (Sp. Laws 1891, ch. 55, § 15,) the bond required of a contractor to do some public work may be executed before the contract, but where the contract is to be made, and is made, at a day after the bond, it must be proved, otherwise than by the execution of the bond, that the board of public works had authority to make the contract.

Appeal by plaintiff, R. A. Costello, from an order of the District Court of St. Louis County, *J. D. Ensign, J.*, made June 17, 1893, denying his motion for a new trial.

On June 25, 1891, Walter C. Doherty as principal and R. S. Munger and W. W. Spalding as sureties entered into a bond to the City of Duluth in the penal sum of \$12,000 reciting that Doherty had on that day entered into a contract with the city for grading Bench and Birch Streets; and the condition of the bond was, that if he should perform the contract on his part and pay for all labor done and materials furnished, then the obligation should be void.

(Sp. Laws 1887, ch. 2, subch. 5, § 5, as amended by Sp. Laws 1891, ch. 55, § 15.)

Doherty then had no contract with the City, but on July 6, 1891, he entered into a contract with the city to grade those streets for \$33,721.10. He completed the work September 19, 1892, and it was on that day accepted by the city and he was paid in full. The plaintiff Costello performed labor and furnished materials for the work at the request of Doherty to the value of \$3,127.91, and brought this action December 15, 1892, upon the bond to recover of Doherty and the sureties, that amount and interest. Each surety answered separately admitting the execution of the bond, but denying the other allegations of the complaint.

The trial was before the Court without a jury. The plaintiff produced the original contract between Doherty and the city and offered it in evidence without any preliminary proof of an award of the work by the Board of Public Works or of a report of their action to, and approval of it by, the Common Council of that city. Defendants objected and the contract was excluded and plaintiff excepted. Plaintiff then offered to show by oral testimony that the contract mentioned in the bond as entered into on the day of the date of the bond was in fact the contract made on July 6, 1891. To this testimony the defendants objected and it was excluded by the Court and the plaintiff excepted to the ruling. Plaintiff then offered to prove by oral testimony that at the time the bond was executed (June 25, 1891) plans and specifications of the work upon the two streets had been agreed upon between the city and Doherty and that the formal written contract was made and signed afterwards on July 6, 1891. Defendants objected, the Court excluded the evidence and the plaintiff excepted to the ruling. The plaintiff then rested and, on motion of the defendants Munger and Spaulding, the Court dismissed the action as to them.

The plaintiff moved for a new trial for errors of law occurring at the trial, but was denied and he appeals.

*J. W. Reynolds*, for appellant.

It appears from the recitals in the bond that it was executed to secure a contract between W. C. Doherty and the City of Duluth dated June 25, 1891, for grading Bench and Burch streets.

The contract offered in evidence and excluded by the Court conforms in all respects to that described in the bond, but bears date as of July 6, 1891. On that ground the trial court held that there was no identity between the contract mentioned in the bond and the one offered in evidence, and that no testimony would be admitted to establish the identity of the two or to show the mistake or error in the bond, where it attempted to state the date of the contract secured. The decision of the Court was hypocritical without authority or precedent, and contrary to the common rules of evidence. *Van Eman v. Stanchfield*, 10 Minn. 255; *Sanborn v. Sturtevant*, 17 Minn. 200; *National Car & L. Builder v. Cyclone S. S. P. Co.*, 49 Minn. 125; *Buxton v. Beal*, 49 Minn. 230; *Steffes v. Lemke*, 40 Minn. 27; *Jefferson v. Asch*, 53 Minn. 446; *Union Ry. S. Co. v. McDermott*, 53 Minn. 407.

*J. L. Washburn and G. W. Mann*, for respondents.

The City of Duluth is not a party to this action. If any mistake has occurred in drafting this bond it cannot be corrected in this action, nor does the complaint state any mistake or ask that it be corrected. *Percival v. McCoy*, 13 Fed. R. 379; *Leavitt v. Palmer*, 3 N. Y. 19.

It is only when all the requirements prescribed by Sp. Laws 1891, ch. 55, § 15, have been complied with that a valid contract exists. A formal written contract only will answer the requirements here prescribed. If the bid of the person making the proposal is accepted, he must enter into a contract with the city. It was not the intention of the Legislature that the acceptance of a bid should constitute the contract. An award of a contract by the Board of Public Works to any person does not become binding upon the city until the same is approved by the Common Council, and reduced to writing, properly executed and a duplicate filed with the comptroller of the city and countersigned by him. There was no offer of proof of these prerequisites of a valid contract. *Starkey v. City of Minneapolis*, 19 Minn. 203; *Stewart v. City of Cambridge*, 125 Mass. 102; *Maupin v. Franklin Co.*, 67 Mo. 327; *Condon v. Jersey City*, 43 N. J. Law, 452; *Logansport v. Blakemore*, 17 Ind. 318; *Wade v. Newbern*, 77 N. C. 460.

GILFILLAN, C. J. The charter of the city of Duluth provides, (Sp. Laws 1891, c. 55, § 15,) in reference to letting contracts for local improvements, for a bond on the part of a contractor, with two sureties, to the city as obligee, conditioned for the faithful performance of the work according to the terms of his contract, and the payment of all material and labor used or employed in making said improvement; and that any person furnishing labor or material on the contract whose claim shall not be paid as it becomes due may sue in his own name on the bond; and that "an award of a contract by the board of public works shall become binding upon the city upon the same being approved by the common council, and upon the approval by said board of the 'contract bond' of the bidder, but not before or otherwise." This action is for labor and material against the principal and sureties in such a bond, executed June 25, 1891, reciting the making between Doherty (the principal obligor) and the city of a contract dated June 25, 1891, "for grading and otherwise improving Bench and Birch streets and the respective extensions thereof," as specified in the contract.

On the trial of the action it was dismissed as to Munger and Spalding, the sureties, for insufficiency of proof. The plaintiff attempted, but failed, to prove a contract between Doherty and the city such as was intended by the bond. He offered in evidence a contract such as was described in the bond, except that it was dated and conceded to have been executed July 6, 1891. The bond was conceded to have been executed June 25, 1891, so that the contract offered was one executed after the execution of the bond, and, *prima facie*, certainly not the one referred to in the bond, which is therein described as already executed. An objection was made by the surety defendants that it was not the contract mentioned in the bond, and that no jurisdiction or authority of the board of public works to make it appears. The plaintiff offered to prove by parol that there was no contract between the city and Doherty to do the work mentioned in the bond other than that offered, and that the bond was executed with reference to, and for the purpose of securing, that contract. Their offers were objected to, and the objection to them and to the contract was sustained.

Under the charter, the order in which the bond and contract are executed is not material. After the bid is accepted and approved,

the bond may be executed before the contract or the contract before the bond. When the bond is executed, and the contract is to be made at some future day, the bond ought regularly to refer to and describe it as a contract to be executed in the future. Whether, in such case, if the contract is referred to as one already executed, it can be proved, contrary to the terms of the bond, that the contract secured is one to be executed in the future, is a somewhat nice question. But it need not be decided, for, in view of another question made by plaintiff, the result must be the same, whatever the decision of that question.

This is claimed to be a statutory bond. It is only as a statutory bond that the plaintiff can sue upon it. It must appear (in some way) that it was taken as authorized by statute to secure performance of a valid contract of the city. Where it is to secure a contract already executed, the obligors acknowledge, by executing the bond, that the contract is valid, and the bond authorized. But the execution of such a bond to secure a contract to be executed in the future, say (as in this case) eleven days after, is no evidence that when the contract is executed the preliminary acts necessary to make it valid have been done. And the plaintiff did not offer to prove the facts necessary to give the board of public works authority to make the contract. So that, had he proved all that he offered to do, still he could not have recovered.

Order affirmed.

(Opinion published 56 N. W. Rep. 459.)

Application for reargument denied November 1, 1893.  
v.55M.—6

## GEORGE R. NEWELL vs. J. C. HIGGINS.

Submitted on briefs Oct. 9, 1893. Affirmed Oct. 20, 1893.

No. 7985.

**Composition with creditors. A secret advantage, void.**

Promissory notes made pursuant to a secret agreement between a debtor and one of several of his creditors, executing a composition agreement, by which, to induce such creditor to sign the composition, the debtor agreed to execute to him the notes, in addition to what the composition stipulated, are void between the parties to them.

Appeal by plaintiff, George R. Newell, from an order of the District Court of Hennepin County, *William Lochren, J.*, made July 23, 1892, denying his motion for a new trial.

On April 3, 1891, Hans C. Peterson, a merchant doing business in Minneapolis was insolvent and unable to pay his debts. He owed George R. Newell & Co. \$4,060. He owed the First National Bank of Minneapolis \$15,000. He owed other creditors about \$11,000. On that day an agreement was made by and between Peterson and his creditors in and by which he agreed to convey to Newell for his firm, lots three (3) and four (4) in block three (3) in Bradford & Bassett's Addition to Minneapolis, in satisfaction of his debt to that firm, and to convey to the Bank lots five (5) and six (6) and the west half of lot four (4) in block four (4) of said Addition in satisfaction of his debt to it and to pay his other creditors fifty per cent. of his indebtedness to them severally in satisfaction of their claims. He and his creditors signed and delivered this composition agreement and it was afterwards fully performed.

To induce George R. Newell & Co. to sign the agreement it was secretly agreed between that firm and Peterson that he should give George R. Newell his four promissory notes for \$500 each with defendant J. C. Higgins as indorser on two of them. The deed and the notes were made and delivered to Newell. When the notes fell due Higgins refused to pay and this action was brought upon the two notes indorsed by him. A jury was waived and the Court made findings and ordered judgment for the defendant. Plaintiff made a motion for a new trial, which was refused, and he appeals.

*Freeman P. Lane and William H. Briggs, for appellant.*

If it be conceded that the transaction between Peterson and George R. Newell was fraudulent as to existing creditors of Peterson, the defendant who had full knowledge of the entire transaction and was a deliberate party to it in all its stages, could not avail himself of such fraud, or rely upon it as a defense to plaintiff's action. Contracts void as to creditors are nevertheless good as between the parties. *Piper v. Johnston*, 12 Minn. 60; 1 Story, Eq. J. § 425; *Benjamin, Sales*, § 490; *Sawyer v. Harrison*, 43 Minn. 297; *Harvey v. Varney*, 98 Mass. 118; *Clemens v. Clemens*, 28 Wis. 637; *Brooks v. Martin*, 2 Wall. 70; *Jones v. Rahilly*, 16 Minn. 320; *Livingston v. Ives*, 35 Minn. 55; *Devlin v. Quigg*, 44 Minn. 534.

Upon the face of the note plaintiff was entitled to recover. In order to avoid payment defendant alleges fraud. He thus becomes the real actor in respect to the substance of the dispute in the action, and by reason of his own fraud is not entitled to relief. *Evans v. Dravo*, 24 Pa. St. 62; *Hendrickson v. Evans*, 25 Pa. St. 441.

In the case at bar the decision of the trial court is based upon *Atkinson v. Danby*, 7 Hurl. & N. 933. That case is not in point as an authority. The decision is more in the nature of a *dictum* than an authority. The real question involved in this case is based upon the principles passed upon in the case of *Sage v. Valentine*, 23 Minn. 102, and *Duluth Chamber of Commerce v. Knowlton*, 42 Minn. 229.

*Christiansen & Tuttle, for respondent.*

This agreement is framed with a view to avoid having all the creditors join. It is made between Peterson and "the undersigned creditors of the second part." Peterson agrees to convey all his real estate except his homestead and agrees to turn over all personal property to be converted into money to be used in the payment of the claims. The agreement was drawn expressly with a view to do away with the necessity of having all sign. It was only intended for the larger creditors. Such agreement is valid and binding upon all the parties who join therein. *Brown v. Farnham*, 48 Minn. 317; *White v. Kuntz*, 107 N. Y. 518; *Norman v. Thompson*, 4 Exch. 755; *Good v. Cheesman*, 2 B. & Ad. 328.

A creditor who unites with others in a composition deed enters



into an obligation thereby, not only with the debtor, but with the other creditors who are parties, and any separate agreement by which he secures to himself advantages not enjoyed by the others is a fraud upon them and void. *Patterson v. Boehm*, 4 Pa. St. 507; *Lee v. Sellers*, 81½ Pa. St. 473; *Lawrence v. Clark*, 36 N. Y. 128; *Fay v. Fay*, 121 Mass. 561; *Sternburg v. Bowman*, 103 Mass. 325; *Feldman v. Gamble*, 26 N. J. Eq. 494; *Harvey v. Hunt*, 119 Mass. 279.

And it has been held that where money was paid by the debtor under such fraudulent agreement it may be recovered from the creditor in an action for money had and received. *Smith v. Cuff*, 6 Moo. & S. 160; *Horton v. Riley*, 11 M. & W. 492; *Gilmour v. Thompson*, 49 How. Pr. 198; *Pinneo v. Higgins*, 12 Abb. Pr. 334; *Atkinson v. Danby*, 7 Hurl. & N. 933; *Dallinger v. Earle*, 82 N. Y. 393; *Knight v. Hunt*, 5 Bing. 429.

GILFILLAN, C. J. One Peterson was indebted to the plaintiff's firm, Geo. R. Newell & Co., and also to various other persons, and Peterson and various of his creditors, including plaintiff's firm, executed a composition agreement by which that firm agreed to accept a conveyance of certain real estate in full of its claim, another creditor agreed to accept a conveyance of certain other real estate in full of the debt due it, and each of the other creditors agreed to accept 50 per cent. of his or their respective claims in full thereof. This agreement was carried out. Before signing the agreement it was agreed orally between Peterson and said firm that, in consideration of the firm signing the agreement, Peterson should (in addition to the conveyance of real estate as mentioned in the agreement) execute to plaintiff four promissory notes for \$500 each, two of them to be indorsed by this defendant, and the notes were so executed and indorsed. Several of the creditors signed the composition agreement after it was signed by plaintiff's firm. The oral agreement was to be kept secret from the other signing creditors, and it was never known to them. This action is to recover upon the two notes so executed and indorsed by defendant.

A composition agreement is an exception to the rule that payment of part of a liquidated and due debt is not satisfaction for the

whole. It is excepted because there is a consideration to each creditor for his agreement to accept less than his claim in full payment. The composition is regarded as an agreement, not merely between the debtor and each creditor, but also between the several creditors. The engagement of each creditor to accept less than his claim is the consideration to each of the others for his like engagement. Each creditor signing has a right to assume that each one is to receive the benefit stipulated in the agreement; that it sets forth truly the terms of composition as to all the parties. Any separate agreement by which one of the creditors secures to himself benefits not conferred on the others, and which agreement is not disclosed to them before they sign the composition, is a fraud upon them. Such separate agreement is void. It is claimed, however, that, in analogy to cases of conveyances and transfers made to defraud creditors, the agreement is valid between the parties to it, and void in favor only of those sought to be defrauded, to wit, the creditors. The decisions are uniform that the agreement is void as to all parties. See 3 Amer. & Eng. Enc. Law, pp. 396, 398, and cases cited in notes 5 and 3, especially *Howden v. Haigh*, 11 Adol. & E. 1033; *Atkinson v. Denby*, 7 Hurl. & N. 933; *Case v. Gerrish*, 15 Pick. 49; *Ramsdell v. Edgerton*, 8 Metc. (Mass.) 227; *Harvey v. Hunt*, 119 Mass. 279; *Fay v. Fay*, 121 Mass. 561; *Wiggin v. Bush*, 12 Johns. 305; *Lawrence v. Clark*, 36 N. Y. 128; *Patterson v. Boehm*, 4 Pa. St. 507; *Lee v. Sellers*, \*81 Pa. St. 473. We have not found any case in which such secret agreement was sustained.

There is a class of cases, of which *Atkinson v. Denby*, *supra*, is one, which go so far as to hold that even where the secret agreement is fully performed by payment of the money, or transfer of the property, stipulated, the debtor may, upon the theory of coercion exercised over him by the creditor, recover it back from the creditor. It is not necessary for us to express an opinion on those cases. It is certain that, where the agreement has not been fully performed, a court will not assist the fraudulent party by compelling performance.

Order affirmed.

(Opinion published 56 N. W. Rep. 577.)

**JAMES I. ALLEN vs. AMERICAN BUILDING & LOAN ASS'N.**

Submitted on briefs Oct. 6, 1893. Affirmed Oct. 20, 1893.

No. 8305.

**Former decisions followed.**

The decisions of this court in *Allen v. Same Defendant*, 49 Minn. 544. and *Carpenter v. Same Defendant*, 54 Minn. 403, followed.

Appeal by defendant, American Building and Loan Association, from a judgment of the District Court of Hennepin County, *William Lochren*, J., entered December 28, 1892, against it for \$12,634.69.

*Hart & Brewer*, *Rea & Hubacheck*, *C. M. Cooley* and *M. B. Koon*, for appellant.

*Lusk*, *Bunn & Hadley*, for respondent.

BUCK, J. This court has recently decided two cases involving substantially the same questions as are now presented for our consideration. We refer to the cases of *Allen v. Same Defendant*, 49 Minn. 544, (52 N. W. Rep. 144), and *Carpenter v. Same*, 54 Minn. 403, (56 N. W. Rep. 95.) Ordinarily, we would not again review these questions, but, in view of the large interests involved, and numerous parties affected, and that the writer hereof was not a member of this court at the time such decisions were made, we have deemed it advisable to consider fully the questions again submitted for our consideration, and, having done so, the former decisions are followed, adhered to, and the judgment of the lower court affirmed.

(Opinion published 56 N. W. Rep. 577.)

GRANT WYATT *vs.* WILLIAM L. JACKSON.

Submitted on briefs Oct. 8, 1893. Affirmed Oct. 20, 1893.

No. 8137.

**A good consideration.**

A certain transaction held to afford a sufficient consideration for a promissory note.

Appeal by defendant, William L. Jackson, from an order of the Municipal Court of the City of Duluth, *Roger S. Powell, J.*, made July 27, 1892, refusing his motion for a new trial.

The plaintiff, Grant Wyatt, sold defendant on March 15, 1892, twenty shares of stock in the Shaw Iron Company for \$400, and took his note for the amount due thirty days thereafter with interest. The stock was left with Wyatt and he gave Jackson a receipt stating that he held the stock as collateral security for the payment of the note. When the note fell due it was not paid and Wyatt sold the stock April 22, 1892, on the market and realized therefor \$197, which he indorsed on the note, and brought this action to recover the balance. The Court made findings and ordered judgment for plaintiff for \$211. Defendant moved for a new trial, claiming that the decision was not justified by the evidence and was contrary to law. His motion was denied and he appeals. His only contention here is, that as the stock was never in fact delivered to him there was no consideration for the note.

*O. L. Young*, for appellant.

*A. E. McManus*, for respondent.

GILFILLAN, C. J. It is a matter of no importance in this case what the character of the transaction in respect to the stock was,—that it was an executory contract by plaintiff to transfer the stock to defendant, or a transfer by plaintiff to defendant, and a pledging or mortgaging by the latter to the former,—for, whatever its character, defendant acquired by it rights in respect to the stock which, upon performance of the contract on his part, he could enforce against plaintiff; and the vesting in him of such rights was a sufficient consideration for the note he executed for the stock.

Order affirmed.

(Opinion published 56 N. W. Rep. 573.)

**JOSEPH GENEVEY vs. WILLIAM A. EDWARDS et al.**

Submitted on briefs Oct. 10, 1893. Reversed Oct. 20, 1893.

No. 8302.

**Verdict unsupported.**Verdict *held* not sustained by the evidence.

Appeal by William A. Edwards, one of the defendants, from an order of the District Court of Hennepin County, *Thomas Canty, J.*, made January 21, 1893, denying his motion for a new trial.

The plaintiff, Joseph Genevey, was in the business of manufacturing and repairing umbrellas at No. 316 First Avenue South in Minneapolis. On November 4, 1891, he made and delivered to the W. A. Edwards Printing Co. his due bill for four dollars payable in merchandise and work from his store. On June 25, 1892, Edwards sent George Stables, the other defendant, to Genevey's store with the due bill. When Stables showed it to Genevey he claimed it had been altered since he made it and put it in his pocket and refused to give it back. Stables reported the occurrence to Edwards, who after consulting C. H. Childs his attorney sent Stables to the County Attorney and then to the City Attorney. After stating the facts in the case Edwards and Stables were advised that Genevey was guilty of larceny in so retaining the due bill. Stables then made complaint in the Municipal Court and Genevey was on June 27, 1892, arrested and brought in and plead not guilty. Genevey was released on his own recognizance and the case was adjourned to July 5, 1892. On that day the accusation was dismissed and Genevey paid the four dollars.

He then brought this action July 9, 1892, against Edwards and Stables for malicious prosecution and on the trial obtained a verdict against Edwards for \$60. Edwards moved for a new trial and being denied appeals.

*C. H. Childs*, for appellant.

Where a party has communicated to his counsel all the facts bearing on the case, of which he had knowledge or which he could have ascertained by reasonable diligence, and has in good faith acted upon the advice received, probable cause is shown and the

party will not be liable. *Moore v. Northern Pac. R. Co.*, 37 Minn. 147; *Gilbertson v. Fuller*, 40 Minn. 413; *Walter v. Sample*, 25 Pa. St. 275; *Wicker v. Hotchkiss*, 62 Ill. 107; *Ash v. Marlow*, 20 Ohio 119.

This rule applies with force when the proceeding is instituted upon the advice and with the approval of the prosecuting officer of the State. Edwards consulted his attorney, stated to him all the facts within his knowledge, and so far as he was concerned acted upon his advice. Stables stated all the facts to the County Attorney and to the City Attorney, and acted upon their advice. There is no evidence showing or tending to show that Edwards and Stables, or either of them, did not act upon the advice of counsel in good faith in instituting the proceedings against plaintiff. *Castro v. De Uriarte*, 16 Fed. R. 93.

*C. E. Brame and Robert Christensen*, for respondent.

Want of probable cause is the gist of the action and if such want of probable cause existed the jury would have a right to infer malice from such want of probable cause alone. *Smith v. Maben*, 42 Minn. 516; *Potter v. Gjertsen*, 37 Minn. 386; *Chapman v. Dodd*, 10 Minn. 350.

The criminal prosecution was instituted to coerce plaintiff to pay the \$4. The jury had the right to so find on the evidence:

GILFILLAN, C. J. This is an action for malicious prosecution of proceedings in the municipal court of Minneapolis against the plaintiff upon a charge of larceny. The verdict shows how difficult it is for the average jury to comprehend that one charged with a crime of which he is innocent is not necessarily entitled to recover damages from his accuser. It is pretty evident that the decision was determined by the mere question of the plaintiff's guilt or innocence of the crime charged against him; for although the court charged correctly upon the effect advice of counsel has on the question of probable cause, and although there can be no question on the evidence but that defendant in good faith took and acted on advice of counsel, the jury rendered a verdict for the plaintiff.

The charge of larceny was of a duebill made by plaintiff's firm, Genevey & Hart, and payable in merchandise and work from their

store to the defendant's firm, the W. A. Edwards Printing Company. There seems to have been some trouble about it,—something like a refusal by plaintiff's firm to deliver goods or work upon it.

Defendant sent Stables, an employe of his firm, with the duebill to plaintiff, either to learn what was the matter, or to collect it. As to what took place at that interview the testimony of plaintiff and of Stables does not disagree in any essential particular. Stables says plaintiff snatched the duebill out of his hand, and plaintiff says Stables handed it to him, (evidently for the purpose of examining it.) They agree that plaintiff put it in his pocket and kept it, refusing to redeliver it to Stables on his demand, excusing this act by the claim that the duebill had been altered since its issue. Stables reported what had occurred to defendant, who sent his attorney, Childs, to plaintiff, to ascertain what was the matter, and to get the duebill. Plaintiff did not deliver the duebill to Childs, but gave him abusive language, and ordered him out of the store. On Childs' reporting this to defendant, the latter sent Stables to him, and it is to be assumed that what was done by those two was by authority of defendant. After hearing Stables' account of what took place between him and plaintiff, Childs expressed the opinion that plaintiff's act was larceny, but advised no other action than to consult the county attorney. They saw the assistant county attorney, and Stables told the story to him, and he expressed the opinion that the case was one of larceny, but thought the charge would better be for petit larceny, which would come within the jurisdiction of the municipal court and under the control of the city attorney, and advised them to see that officer. They did so, and, after hearing Stables' account, he expressed the opinion that it was a case of larceny, and advised or authorized a prosecution in the municipal court. They went to that court, Stables swore to a complaint, a warrant was issued, plaintiff arrested and arraigned, and pleaded not guilty. On a day to which this case was continued, the court, upon the consent of the city attorney, who had charge of it, dismissed it. There can be no doubt that Stables fully and fairly stated what took place between him and plaintiff to Childs, to the assistant county attorney, and to the city attorney, and that he, on behalf of the defend-

ant, sought and acted upon the opinions of those attorneys. On their opinions he had a right to believe, and beyond question did believe, that plaintiff's act constituted larceny, and, because of such belief, made in good faith the complaint against him.

Honest belief in the party's guilt upon such advice, after such full and fair statement, is probable cause to commence a criminal prosecution.

Order reversed.

(Opinion published 56 N. W. Rep. 578.)

WM. O'DONNELL vs. JAMES BURROUGHS.

Submitted on briefs Oct. 8, 1898. Reversed Oct. 20, 1898.

No. 8836.

**Platform scales set for use, not fixtures.**

The owners of a village lot, with the consent of the village council, set platform weighing scales in the street opposite the lot, upon a brick foundation let down into the ground, the upper side of the scales being even with the surface of the ground. *Held*, not part of the realty.

**One having rightful custody of a chattel may retain it as against a stranger.**

The owners left the scales on the land after the foreclosure of a mortgage of the real estate became absolute. *Held* that, as between the holder of the mortgage title and any one not having acquired the title to the scales from the original owners, the former is entitled to the possession and use of the scales.

Appeal by plaintiff, William O'Donnell, from a judgment of the District Court of Sibley County, *Francis Cadwell, J.*, entered August 8, 1893.

On February 25, 1889, Brown and Flinn owned a lot in the village of Green Isle on which was a store building in which they sold merchandise and bought country produce. In the street just outside the sidewalk in front of the building they had placed platform scales for weighing hay, grain and other bulky articles. They obtained consent of the village council and had excavated a pit



three feet deep and put in a foundation twelve feet long by eight feet wide on which the scales rested, the platform being about even with the surface of street. These scales were used by them in their business and in weighing loads for others for hire. On that day they mortgaged the real estate to Thomas Welch to secure the payment of \$2,000. On December 18, 1889, they sold and conveyed the real estate to Neil McLaughlin, subject to the mortgage. On February 18, 1891, McLaughlin made a general assignment to Frank E. Creelman of his nonexempt property for the benefit of his creditors. On July 28, 1890, Welch foreclosed his mortgage and bid in the real estate. No redemption was made and on August 25, 1891, he sold and conveyed the real estate to O'Donnell the plaintiff and he claims the scales as part of the real estate mortgaged to Welch.

Creelman, claiming that the scales went by the deed to McLaughlin and came to him by the assignment, sold them October 17, 1891, by bill of sale to the defendant, James Burroughs. The scales remain in the street, as placed by Brown and Flinn. The parties without action agreed upon a statement of the facts on which the controversy depends and made affidavit and submitted the question as to who owns the scales, to the District Court; pursuant to 1878 G. S. ch. 82, § 7. Judgment was there rendered for defendant, Burroughs, that he owned the scales and was entitled to their possession. The plaintiff, O'Donnell, appeals.

*W. H. Leeman*, for appellant.

Plaintiff O'Donnell contends that the scales were fixtures and passed to the mortgagee at the foreclosure sale and now belong to him. In the cases cited, scales were the subject of controversy and the foregoing proposition is confirmed. *Arnold v. Crowder*, 81 Ill. 56; *Bliss v. Whitney*, 91 Mass. 114; *McGorrish v. Dwyer*, 78 Iowa, 279; *Scudder v. Anderson*, 54 Mich. 122.

The license given by the village to Brown & Flinn in no way interfered with or affected their title or changed the character of the property, either to make it real estate or personal property.

O'Donnell received his deed from Welch and took possession on August 25, 1891. Burroughs did not receive his bill of sale from Creelman until October 17, 1891. From August 25 to October

17, the plaintiff was in the lawful possession, prior to any asserted right or title by defendant. McLaughlin's only source of title to the scales is his deed of the premises from Brown & Flinn and if the scales were not a part of the realty, they did not pass by the deed and McLaughlin never owned them, and plaintiff would be entitled to judgment as against defendant, on the ground of his prior lawful possession.

*P. W. Morrison*, for respondent.

It is necessary to consider the intention of the parties, the nature of the article annexed, the purpose or use for which the annexation was made and the structure of the article and mode of its annexation, to determine whether it has become part of the real estate. A chattel does not assume the character of real property or become a fixture to it when placed upon a public street, with consent of the Village Council. If Brown & Flinn had intended the scales should become a permanent fixture to the freehold, they would have placed them upon the lot where their store building is constructed, instead of in the public street where they must be removed when ordered by the village authorities. *Hill v. National Bank*, 97 U. S. 450; *McRea v. Central Nat. Bank*, 66 N. Y. 489; *Voorhees v. McGinnis*, 48 N. Y. 278; *Pierce v. George*, 108 Mass. 78; *Ferris v. Quimby*, 41 Mich. 202.

The scales were personal property, placed upon the public street with the consent of the Village Council and were not physically annexed to the freehold so as to make them a part of it. They never passed under the mortgage from Brown & Flinn or under the deed to McLaughlin. *Wolford v. Baxter*, 33 Minn. 12; *Farmers L. & T. Co. v. Minneapolis E. & M. Works*, 35 Minn. 543.

It does not appear in the agreed statement of facts how McLaughlin acquired his title to the scales. It might be that McLaughlin bought them from Brown & Flinn as personal property, and separate from the real property. However, McLaughlin's right or title to the scales was never disputed and it was not necessary to investigate it.

GILFILLAN, C. J. Whether the platform scales are to be regarded as part of the realty or as personal property, it is impossible to

sustain the decision of the court below that the title to them is in the defendant. If real estate, the title passed under the mortgage to Welch and the foreclosure thereof, and plaintiff has that title. The mortgage was prior to the conveyance (by the mortgagors) to McLaughlin, under which alone the latter could claim title to the scales. If they were personal property they did not pass to him by the conveyance of the real estate, and he could not transfer them to his assignee, under whom defendant claims.

The facts stipulated, especially, that the scales were set up in the street opposite the lot of the parties setting them up; that the parties had to get, and did get, permission from the village council to set them there, and that consequently they could remain there only during and by the sufferance of the council,—are inconsistent with an intent to annex them permanently to the soil, so as to make them part of it. They were to be regarded as set up temporarily only, to be removed whenever the council should withdraw its permission. They did not become part of the real estate.

But, although not a part of the realty, so that the title of the original owners could pass to plaintiff under the mortgage and foreclosure, and although the title of the original owners may still remain in them, yet as between these two parties the right of the plaintiff is superior. The scales are in his possession, on his land, left there by the owners. If those owners choose to let them remain in his possession, no one else can question his right to possess and use them.

The judgment must be reversed, and the court below directed to enter judgment adjudging that the plaintiff is entitled to the sole possession and use of the scales.

(Opinion published 56 N. W. Rep. 579.)

UNION CENTRAL LIFE INSURANCE CO. *vs.* JAMES R. TAGGART.

Submitted on briefs Oct. 3, 1893. Affirmed Oct. 20, 1893.

No. 8276.

**Promissory Notes Taken as Payment.**

One of the conditions annexed to a policy of insurance was that it "should not be valid or binding until the first premium was paid to the company," but no special mode of payment was provided for in the policy. The company delivered the policy to the assured, and took his promissory notes for the first premium. *Held* that, even in the absence of any express agreement to that effect, the company must, in judgment of law, be deemed to have accepted the notes in payment of the premium, and the policy became binding, and constituted a valid consideration for the notes.

Appeal by defendant, James R. Taggart, from an order of the District Court of Hennepin County, *Charles M. Pond*, J., made February 2, 1893, denying his motion for a new trial.

The plaintiff, the Union Central Life Insurance Company, a corporation of Cincinnati, Ohio, on December 10, 1887, issued its policy to defendant, whereby it insured his life in the sum of \$2,500 in consideration of the annual payment of \$100.02 to it, on December 15 in each year during the term of fifteen years. One of the conditions in the policy was, that it should not be valid until the first year's premium was paid. He paid \$25.02 in cash on the first year's premium and gave his three promissory notes for \$25 each for the residue. The notes fell due, but were not paid, and the Company brought this action upon them, in a Justice's Court and obtained judgment. He appealed to the District Court where the action was again tried, findings made and judgment ordered for the plaintiff. The defendant moved for a new trial, but was denied. He now appeals to this Court.

*J. F. Keene*, for appellant.

It is submitted that these notes were not payment but only promises to pay, unless there was an agreement between the parties that the notes should be accepted as payment. They do not extinguish the debt but are merely evidence of it and promises

to pay it. *Combination S. & I. Co. v. St. Paul City Ry. Co.*, 47 Minn. 207; *Hanson v. Turbox*, 47 Minn. 433; *Geib v. Reynolds*, 35 Minn. 331.

The notes not being payment of the first year's premium, the policy was void and was not consideration for the notes. There was no other consideration for them, hence they are without consideration and void.

*Charles P. Barker*, for respondent.

This Court has held such a contract valid, and the weight of authority is to the same effect. *Schreiber v. German Am. H. Ins. Co.*, 43 Minn. 367; *Shakey v. Hawkeye Ins. Co.*, 44 Iowa, 540; *Williams v. Albany City Ins. Co.*, 19 Mich. 451; *Wall v. Home Ins. Co.*, 36 N. Y. 157.

MITCHELL, J. The notes in suit were executed for part of the first year's premium on a policy of insurance on the life of the defendant. One of the conditions annexed to the policy was that it "shall not be valid or binding until the first premium is paid to the company or its authorized agent." The main contention of the defendant, and the only one we deem it necessary to consider, is that there was an entire want of consideration for the notes, for the reason that, under the condition quoted, the policy never became operative, because the first year's premium had not been paid in cash. There is clearly nothing in this point.

It is usually provided that the policy, though delivered, shall not be binding until the premium is paid; and, where this is the case, the policy does not take effect, even though delivered, until the provision is complied with. But the mode of payment of the premium is immaterial if it be accepted by the company or its agent, and no special mode be provided for in the policy. The policy was silent as to the mode of payment. It was delivered with a receipt for the first year's premium attached, countersigned by the company's agent, who accepted defendant's notes for part of it. On this state of facts, even in the absence of any express agreement to that effect, the company must, in judgment of law, be deemed to have accepted the notes in payment of the premium. See *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390-402.

This constituted a consideration for the notes. There is no other point in the case worthy of any special consideration.

Order affirmed.

(Opinion published 56 N. W. Rep. 579.)

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CITY OF DULUTH *vs.* MAXIMILIAN BLOOM.

Submitted on briefs Oct. 16, 1893. Reversed Oct. 20, 1893.

No. 8425.

**A city ordinance construed.**

A certain ordinance of the city of Duluth *held* to apply only to pawnbrokers' shops, and to secondhand stores, or shops of the class commonly known as "junk shops."

**A furniture store is not a junk-shop.**

Also, that a store in which furniture, both new and secondhand, is exclusively dealt in, is not a "junk-shop," within the meaning of the ordinance.

Appeal by defendant, Maximilian Bloom, from an order of the Municipal Court of the City of Duluth, *Roger S. Powell, J.*, made August 10, 1893, denying his motion to vacate and set aside his conviction.

On June 3, 1893, Daniel Kenna made complaint on oath in the Municipal Court that Bloom carried on and conducted the business of dealer in second hand goods at No. 108 West First Street in Duluth, without having first obtained a license so to do, contrary to Ordinance No. 52 passed May 5, 1890. A copy of this ordinance is printed in the margin.<sup>1</sup> A warrant was issued and Bloom was arrested and plead, not guilty. On the trial it was shown that

**<sup>1</sup> DULUTH CITY ORDINANCE.**

**Sec. 1.** No person or persons shall carry on or conduct the business or calling of pawnbroker or dealer in second hand goods within the City of Duluth without first having obtained a license so to do, under the penalty of twenty five (25) dollars for each offense.

**Sec. 2.** Any person who loans money on deposit or pledge of personal property or choses in action on condition of selling the same, or returning the

v.55M.—7

he kept a second hand store and dealt in new and second hand furniture, stoves, carpets, crockery and glassware. He was found guilty. A stay of proceedings for thirty days was granted and he was admitted to bail.

He made a case containing all the evidence, exceptions and pro-

same to the pledgor or depositor, or to their agents or assigns at a stipulated price, shall be deemed to be a pawnbroker.

Sec. 3. Any person wishing to engage in pawnbroking within the City of Duluth, shall make application to the Council of said city for a license, stating the place in said city where he proposes to carry on said business, and shall accompany his application with a bond in the sum of two thousand (2,000) dollars, executed to the City of Duluth, with sufficient sureties, conditioned that in conducting said business he will in all things observe the conditions and provisions of this ordinance.

Sec. 4. Upon the approval of said application and bond as aforesaid, said applicant shall pay to the City Treasurer the sum of two hundred and fifty (250) dollars, and shall thereupon receive from the City Clerk a license issued in the name of the said city, authorizing said person to engage in the business of pawnbroking at the place mentioned in said license, for a term of one year, to expire on the first day of May succeeding the date of the issuance of said license.

Sec. 5. The City Clerk shall keep a register of all licenses granted under this ordinance, in which he shall record the name of the person licensed, the time of issuing the same, and the place of business of such person.

Sec. 6. Every person so licensed as aforesaid shall keep at his place of business a book or register in which he shall enter in writing a description of all personal property or choses in action received by him in pledge, the time when they were so received, and any prominent or descriptive mark by which said article may be identified, together with the name and residence of the person or persons by whom the same are pledged.

Sec. 7. Every person licensed according to the provisions of this ordinance shall during the ordinary hours of business when requested, submit said book to any police officer of the City of Duluth who may be in search of any article lost, stolen or embezzled, and shall exhibit to any officer any personal property or choses in action deposited or pledged with him. Every licensed person failing to comply with the provisions of this section shall upon conviction thereof, be fined in a sum not exceeding one hundred (100) dollars or by imprisonment not exceeding sixty days.

All the provisions of this ordinance shall apply to any person keeping a second hand store or junk shop in said city, except that the amount of license required of such person shall be one hundred (100) dollars per year and the amount of the bond required of such persons shall be one thousand (1,000) dollars.

ceedings at the trial and on motion the Court allowed, settled, signed and filed it. On it and the files and record he moved to set aside the conviction on the ground that it was not justified by the evidence and was contrary to law. This motion was refused and he appeals.

*Austin N. McGindley*, for appellant, cited *City Council of Charleston v. Goldsmith*, 12 Rich. Law, 470; *Eastman v. City of Chicago*, 79 Ill. 178.

*H. F. Greene* and *A. H. Crassweller*, for respondent, cited *City of Duluth v. Krupp*, 46 Minn. 435; *City of St. Paul v. Colter*, 12 Minn. 41.

MITCHELL, J. The defendant was convicted, under an ordinance of the city of Duluth, of "carrying on and conducting the business of dealer in secondhand goods without first having obtained a license so to do."

The only question which we find it necessary to consider is whether defendant's business came within the provisions of the ordinance.

It appears that he kept a store in which he dealt in new and secondhand furniture, exclusively. We think the evidence sufficient to justify the conclusion that his dealing in secondhand furniture was not merely occasional and incidental, but a regular and principal part of his business; so that it may be assumed, for the purposes of this case, that the business of defendant came within the provisions of the ordinance, providing they apply to all dealers in any kind of secondhand goods.

The city charter, Sp. Laws 1887, ch. 2, subch. 8, § 5, *First*, p. 90, gives the common council authority "to license and regulate all auctioneers, pawnbrokers, dealers in secondhand goods, junk dealers," etc., and provides that the power to regulate thus given shall include the power to define who shall be considered as auctioneers, pawnbrokers, dealers in secondhand goods, and junk dealers. The first section of the ordinance provides that no person shall carry on or conduct the business or calling of pawnbroker or dealer in secondhand goods without first having obtained a license so to do, but does not attempt to define who shall be considered pawnbrokers or dealers in secondhand goods. The re-



maining sections of the ordinance, except the last clause of the seventh, treat exclusively of pawnbrokers, defining who shall be deemed such, providing for their procuring license, giving bonds with sureties, for the registry of all such licenses by the city clerk, requiring the licensee to keep a register of all property received by him in pledge, and of the names and residences of the persons from whom received; also that this register, as well as the property itself, shall be subject to inspection by any police officer in the city in search of any lost or stolen property. The last clause of section seven then provides that "all the provisions of this ordinance shall apply to any person keeping a secondhand store or junk shop."

It will be observed that the first section of the ordinance refers to two classes of persons, viz. "pawnbrokers" and "dealers in secondhand goods." The city council then proceeds, in the exercise of the power specifically granted by the city charter, to define who shall be considered pawnbrokers, and nothing is said about dealers in secondhand goods until we come to the last clause of section seven. That this clause was intended, not merely to extend the provisions of the ordinance to dealers in secondhand goods, but also to define who shall be considered such dealers, within the meaning of the ordinance, is apparent from its terms. In the first place, it is not the mere dealing in the articles, but the keeping a store or shop (terms not used in the first section) for that purpose, to which the ordinance is made to apply. Again, the word "junk" is one neither used nor referred to in the first section, so that it seems to us that in using the phrases "a secondhand store or junk shop" the city council must have used the latter as definitive of the former, thereby intending to limit the ordinance to that class of secondhand stores known as "junk shops." Every junk shop is a secondhand store, but not every secondhand store is a junk shop. The term "secondhand store," if not qualified or limited, would include any store in which any kind of secondhand goods are dealt in, as, for example, secondhand furniture or secondhand books, but stores in which these articles are dealt in would not necessarily be junk shops. The word "junk," which is of nautical origin, originally meant old or condemned cable and cordage cut into small pieces, which, when untwisted, were used for various

purposes on the ship. Hence the word afterwards came to mean wornout or discarded material in general, that still may be turned to some use, especially old rope, chain, iron, copper, parts of machinery, bottles, etc., gathered or bought up by persons called "junk dealers." A junk shop—a place where junk is bought and sold—has been defined as a place where odds and ends are purchased and sold; a store where old metals, ropes, rags, etc., are bought and sold. 12 Amer. & Eng. Enc. Law, 243; *City Council of Charleston v. Goldsmith*, 12 Rich. Law, 470.

It is our opinion that it must be held that the city council intended the provisions of the ordinance to be limited to secondhand stores of the class commonly known as "junk shops." This is the class of secondhand stores over which police regulations are peculiarly needed, for the reasons that they and pawnbrokers' shops are the places where thieves most usually attempt to dispose of stolen property, and whose keepers not unfrequently become fences for such goods,—reasons which do not apply with anything like the same force to secondhand stores of other kinds, as, for example, secondhand furniture or secondhand book stores. It is also an argument in favor of our construction of the ordinance that its provisions regulating the manner of conducting the business are entirely appropriate in the case of pawnbrokers' shops and junk shops, at which they seem to be specially aimed, but hardly appropriate in the case of many other kinds of secondhand stores. Moreover, this ordinance, being in partial restriction of trade and penal in its nature, ought to receive a somewhat strict construction, and no cases brought within its operation by doubtful inference. As it is very clear that the place kept by defendant was not a secondhand store or shop of the class known as "junk shops," it follows that, under the construction we have placed upon the ordinance, his business did not fall within its provisions.

Order reversed.

(Opinion published 56 N. W. Rep. 530.)

DAVID HOWLAND *vs.* HANS JEUEL.

Argued Oct. 12, 1893. Affirmed Oct. 20, 1893.

No. 8323.

**Practice; Appearance waives defects in service.**

A voluntary general appearance on part of a garnishee waives all defects in the garnishee summons or in its service on him.

**Affidavit of garnishment.**

It is not necessary that an affidavit of garnishment should state that the garnishee is a corporation.

Appeal by the garnishee, the Central Women's Christian Temperance Union of Minneapolis, a corporation, from a judgment of the District Court of Hennepin County, *William Lockren, J.*, rendered March 7, 1893, against it for \$114.80.

David Howland, plaintiff, commenced this action December 23, 1892, against Hans Jeuel, defendant, upon contract to recover money due from him. At the same time Howland made and filed an affidavit stating the pendency of the action and that he believed that the Central Women's Christian Temperance Union of Minneapolis was then indebted to Jeuel in an amount exceeding \$25. The affidavit did not state that this Union was a corporation. A garnishee summons was issued and served on Helen E. Gallinger, its treasurer, requiring the garnishee to appear before the Court on February 4, 1893, at 9 o'clock A. M. and answer touching such indebtedness. The copy summons served was not signed with the name of the plaintiff or his attorneys, but the corporation appeared by its treasurer and disclosed that it was indebted to Jeuel \$114.80 for milk supplied by him at its restaurant in that city. Mary A. Jeuel, defendant's wife, meantime filed her complaint in intervention, by leave of the Court and appeared at the disclosure and claimed that the debt belonged to her. The Court directed judgment for plaintiff against the garnishee for the \$114.80 and it was entered March 7, 1893. The garnishee appeals.

*John Day Smith*, for appellant.

The affidavit for garnishment is fatally defective in omitting to state that the Central Women's Christian Temperance Union of

Minneapolis is a corporation. The garnishee summons was not signed by the plaintiff or his attorneys and its service did not confer upon the Court jurisdiction of the corporation.

In garnishee proceedings jurisdiction cannot be acquired by voluntary appearance of the parties or be aided by presumptions. Neither can any substantial requirement of the statute be waived by the party garnished, because others have an interest in the result, quite equal to that of the parties to the action. *Weimeister v. Manville*, 44 Mich. 408; *Ettelsohn v. Fireman's F. Ins. Co.*, 64 Mich. 331.

A garnishee cannot waive material defects in the summons or in its service, to the prejudice of the intervenor or a creditor levying a subsequent attachment. *Southern Bank v. McDonald*, 46 Mo. 31; *Haley v. Hannibal, St. Joe R. Co.*, 80 Mo. 112; *Gates v. Tusten*, 89 Mo. 13; *Pratt v. Sanborn*, 63 N. H. 115; *Herrick v. Morrill*, 37 Minn. 250.

*Savage & Purdy*, for respondent.

The garnishee has by its conduct in the Court below waived the objections it is seeking to raise here. *Babcock v. Sanborn*, 3 Minn. 141; *Holmes v. Campbell*, 12 Minn. 221; *Washburn v. Winslow*, 16 Minn. 33; *Burt v. Parish*, 9 Ala. 211.

This Court has before it no authenticated record of what took place in the District Court. There is no settled case, no bill of exceptions, no certificate from the Judge who heard the case, as to what papers were considered by him on the hearing, or what proceedings were then had. There is then nothing in the record brought here that overthrows the *prima facie* presumption of jurisdiction which attaches to all judgments of the District Court in ordinary actions at law. *Holmes v. Campbell*, 12 Minn. 221; *Davidson v. Farrell*, 8 Minn. 258; *Smith v. Valentine*, 19 Minn. 452; *Herrick v. Butler*, 30 Minn. 156; *Nye v. Swan*, 42 Minn. 243.

The affidavit of garnishment follows the statute closely and states all that is required by it. An allegation of incorporation is not indispensable in an ordinary pleading by or against a corporation. Its absence does not make the pleading demurrable. 1878 G. S. ch. 66, § 112. *State v. Torinus*, 22 Minn. 272; *Zion Church v. St.*

*Peter's Church*, 5 Watts & S. 215; *Henriquez v. Dutch West India Co.*, 2 Ld. Raym. 1532; *Phoenix Bank v. Donnell*, 40 N. Y. 410; *O'Donald v. Evansville R. R. Co.*, 14 Ind. 259; *Ryan v. Farmers' Bank*, 5 Kans. 658; *Stanly v. Richmond, etc., R. Co.*, 89 N. C. 331; *Western Railway v. Sistrunk*, 85 Ala. 352.

By appearing and making disclosure without objection the garnishee waived any defects in the summons served upon it. *Prince v. Heenan*, 5 Minn. 347; *Hinkley v. St. Anthony Falls W. P. Co.*, 9 Minn. 55.

MITCHELL, J. It is more than doubtful whether the record in this case is sufficient to bring up any question for review. But, waiving this point, we discover no merit in the appeal.

The voluntary general appearance of the appellant waived all defects in the garnishee summons or in the mode of its service on the garnishee. It was not necessary that the affidavit of garnishment should state that the garnishee was a corporation. It is at least an open question whether it is necessary, even in a pleading in an action by or against a corporation, to aver the incorporation, except in cases where the action, as its gist or substance, involves the corporate existence, in which case, of course, it would have to be alleged, the same as any other fact constituting the cause of action. No such averment was required at common law, and we have no express statute changing the rule. 1878 G. S. ch. 66, § 111, was intended merely to simplify the form of pleading where an averment of incorporation is necessary. *Dodge v. Minnesota P. S. Roofing Co.*, 14 Minn. 49, (Gil. 39.)

But it is enough for the present purposes to say that the statute in relation to affidavits for garnishment (1878 G. S. ch. 66, § 164) does not require any such averment, and, as in any case of attachment, an affidavit is sufficient if it conforms to the statute.

Judgment affirmed.

(Opinion published 56 N. W. Rep. 531.)

A. L. GORDON *vs.* THOR J. VEN.

Submitted on briefs Oct. 10, 1893. Reversed Oct. 20, 1893.

No. 8367.

**An open current account; what may be charged in it.**

It was competent for the parties to agree that the amount of an order for the payment of money, given by a third party to plaintiff on defendant, and accepted by the latter, should be made a part of an open current account between them, and charged thereon to defendant; and, this being done, any payment which would take the balance of the account out of the statute of limitations would also take the item of the order out of the statute.

Appeal by plaintiff, A. L. Gordon, from a judgment of the District Court of Norman County, *Frank Ives*, J., entered against him June 9, 1893, for \$13.45.

Gordon kept a retail country store at Ada and sold goods on credit to defendant, Thor J. Ven, a farmer, living near Hendrum. R. Orbeck did some painting for Ven in 1885 and on October 2, of that year gave Gordon an order on Ven for \$16. Ven afterwards in 1886 signed an acceptance of the order. On October 20, 1885, Gordon charged Ven in his account with the amount of the order, but did not give it to Ven. Gordon rendered his account containing this charge and Ven made payments thereon from time to time without objection up to November 26, 1891. He then claimed that Orbeck did not do the painting properly and refused to pay the balance of the account. Gordon commenced this action July 16, 1892, in Justice's Court upon the account and recovered judgment for \$21, the balance due with interest. Ven appealed to the District Court on questions of law alone. The judgment of the justice was there reversed, that Court being of the opinion that the Orbeck order was not properly made an item of the account and was more than six years past due when this action was begun. Gordon appeals to this Court.

*W. W. Calkins*, for appellant.

*Michael A. Brattland*, for respondent.

**MITCHELL, J.** The complaint in this action, which was commenced in justice court, consisted of an itemized account, running through several years, for goods, wares, etc., sold and delivered by plaintiff to defendant, and of credits for cash paid by defendant on the account each year, and showing a balance due to plaintiff. One of the early items in this account was one of \$16 for an order for that amount given to plaintiff on defendant by one Orbeck, to whom defendant was indebted in that amount for work. Defendant had accepted the order, and plaintiff charged him with it in his account, which was open and current. This was in 1885. The account remained open and current down to the latter part of 1891. There was evidence tending to prove that at the time plaintiff received the order he told defendant that he had charged him with it on his account, and that defendant consented to this being done. Each year thereafter plaintiff sent to defendant a statement of his book account, which included this item of the amount of the order, to which the defendant made no objection, but yearly made payments, generally, on the account. It is conceded that, if this item of \$16 is a proper part of the account, then, because of these yearly payments, no part of the account is barred by the statute of limitations.

The justice rendered judgment in favor of the plaintiff for the balance due on the account as claimed in the complaint. Upon appeal to the district court on questions of law alone the court reversed the justice, apparently on the ground that this item, being evidenced by a written order accepted by the defendant, was no proper part of the account, but a separate and distinct cause of action, and, being such, was barred by the statute. In this the court erred. It was entirely competent for the parties to agree that it should be made a part of the book account. This is what the evidence showed they did, not only by express agreement, in the first instance, but also impliedly, by their subsequent conduct running through a number of years. To allow defendant now to go back on this agreement for the purpose of enabling him to avail himself of the statute of limitations would be neither justice nor good law. *Perrine v. Hotchkiss*, 2 Thomp. & C. 370, and *Stickney v. Eaton*, 4 Allen, 108, principally relied on by the defendant, are not at all in point, as will be readily discovered upon a careful examination of the facts in those cases.

The defect in the complaint, it is conceded, was obviated by the admission of the evidence without objection.

Judgment reversed, and cause remanded, with directions to the district court to enter judgment affirming the judgment of the justice.

(Opinion published 56 N. W. Rep. 581.)

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SECURITY BANK OF MINNESOTA *vs.* MINNEAPOLIS COLD STORAGE CO.

Submitted on briefs Oct. 8, 1893. Affirmed Oct. 20, 1893.

No. 8487.

**Warehouse receipt construed.**

A warehouse receipt stated that the property was deliverable "on payment of charges," without stating their nature or amount, the spaces for the insertion of the amount of "storage" and "advanced" charges respectively being left blank. *Held*, that this was sufficient to put a purchaser of the property upon inquiry as to the amount and character of the charges, and that the warehouseman was not estopped, as against such purchaser, from asserting his lien for "advanced" charges.

Appeal by plaintiff, the Security Bank of Minnesota, from an order of the District Court of Hennepin County, *Robert D. Russell, J.*, made August 26, 1893, denying its motion for a new trial.

On November 27, 1892, the defendant, the Minneapolis Cold Storage Company, a corporation, contracted with J. W. Stevens & Co. to receive and store 640 barrels of apples valued at \$1,280 at its cold storage warehouse No. 69 Nicollet Street on Nicollet Island, Minneapolis. The apples were about to arrive by the Chicago, M. & St. P. Ry. Co. and defendant agreed to advance and pay the freight, \$566.78, and receive and store the apples and was to receive eight (8) cents per barrel, per month, for storage and be repaid the money it advanced for the freight with interest. The defendant received and stored the apples, paid the freight and issued to W. J. Stevens & Co. a receipt stating it had received the apples and that they were deliverable to the firm or order on payment of charges. Storage ———. Advance charges ———. Loss or damage by fire at owners' risk.



J. W. Stevens & Co. sold, indorsed and delivered the receipt to the Bank and on May 23, 1893, it tendered to defendant the storage and demanded the apples. The defendant demanded the further sum of \$566.78 paid by it for freight, with interest. The Bank refused to pay this freight and brought this action and replevied the apples. At the trial on June 28, 1893, the Court sustained the claim of the defendant and ordered judgment in its favor. The Bank moved for a new trial and being denied appeals.

*Samuel M. Davis*, for appellant.

The Bank claims that the receipt does not in terms show a lien right in the Cold Storage Company, but is silent and blank as to any advance charges, and that as against it, being an innocent purchaser for value without notice, the company is estopped from making any such claim. The language of the receipt is defendant's own, used deliberately and hence, in case of ambiguity, is to be taken most strongly against it. The amount of the advance charges was within the knowledge of defendant at the time the receipts were issued, and should have been inserted. The defendant in order to reserve a right in itself, beyond its right as a warehouseman, was bound to express the fact of this right and the extent of it, in terms clear and unequivocal. *Dean v. Driggs*, 137 N. Y. 274; *Sears v. Wingate*, 3 Allen, 103.

The warehouse receipts in question were negotiable instruments. 1878 G. S. ch. 124, § 17; *State v. Loomis*, 27 Minn. 521; *Bradwell v. Howard*, 77 Ill. 305; *Lickbarrow v. Mason*, 1 Smith's Lead. Cas. 1147.

The equities disclosed show that there was knowledge on the part of the original owners, who took the receipt from defendant, that the goods were still bound for certain freight charges. This defense is not available to defendant, provided the Bank had no knowledge of the facts and parted with value upon the faith of the paper and the goods represented thereby. *First Nat. Bank v. Dean*, 137 N. Y. 110.

The representation held out to the Bank was, that there were no advance charges, and upon the familiar principle that where one of two innocent persons—that is, persons each guiltless of an intentional wrong must suffer a loss, it must be borne by that one of

them who by his conduct, acts or omissions, has rendered the injury possible. 2 Pomeroy, Eq. Jur. §§ 803, 805.

In *Stein v. Rheinstrom*, 47 Minn. 476, the language of the receipt was such as would ordinarily put a purchaser upon his inquiry.

*Merrick & Merrick*, for respondent.

There is in reality but one question involved in this appeal and that is whether the warehouse receipt issued to J. W. Stevens & Co. contained such information or was so worded as to put the Bank upon inquiry as to the precise terms of the bailment.

The receipt states that the apples are subject to charges. This required the exercise of ordinary care and prudence in reference to those charges. *Stein v. Rheinstrom*, 47 Minn. 476; *Hall v. Hale*, 8 Conn. 336; *Ayer v. Hutchins*, 4 Mass. 370; *First Nat. Bank St. Paul v. Scott County*, 14 Minn. 77; *Slater v. West*, 3 Car. & P. 325; *Wiggins v. Bush*, 12 Johns. 306.

MITCHELL, J. 1878 G. S. ch. 124, § 17, does not make bills of lading and warehouse receipts "negotiable," in the proper sense of the term, or put them on the footing of promissory notes and bills of exchange, but was intended merely to prescribe the mode of transferring or assigning such instruments, and to provide that their transfer should, for certain purposes, be equivalent to an actual transfer and delivery of the property itself. *National Bank of Commerce v. Chicago, B. & N. Ry. Co.*, 44 Minn. 224-236, (46 N. W. Rep. 342, 560.) Hence, if defendant is prevented from asserting, as against plaintiff, its lien for "advanced charges," it must be on the ground that it is equitably estopped from doing so, as against an innocent purchaser, by reason of the statements or representations contained in its warehouse receipt issued to plaintiff's assignor, Stevens & Co.

It is not pretended that this receipt contains any affirmative misstatement of fact. The most that is or can be claimed is that by omitting to state the amount of "advanced charges," and leaving that item blank, the defendant thereby in effect represented that there were no such charges. We cannot assent to this proposition. The receipt expressly stated that the goods were deliverable "on payment of charges," without specifying their nature or amount.

The blanks for the amounts of "storage" and "advanced" charges were both left unfilled, and, if the failure to state the amount of the latter amounted to a representation that there were no such charges, then with equal reason it could be claimed that the failure to state the charges for storage amounted to a representation that there were to be none. Such a position is not tenable. The receipt, on its face, informed any one dealing with it that the property was subject to charges, but was silent as to their nature or amount. This was sufficient to put a purchaser of the property upon inquiry as to the amount and character of the charges upon it in the hands of the defendant. *Stein v. Rheinstrom*, 47 Minn. 476, (50 N. W. Rep. 827.)

Order affirmed.

VANDEBURGH, J., took no part.

(Opinion published 56 N. W. Rep. 582.)

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JARIUS H. DAVIS *et al.* vs. LOU DAVIS.

Argued Oct. 13, 1893. Affirmed Oct. 20, 1893.

No. 8323.

Findings justified by the evidence.

Evidence held to justify the findings.

Appeal by defendant, Lou Davis, from an order of the Municipal Court of Minneapolis, *Charles B. Elliott, J.*, made March 3, 1893, denying her motion for a new trial.

*Johnson & Rinehart*, for appellant.

*Samuel L. Baker*, for respondents.

MITCHELL, J. The only issue on the trial of this case was as to the value of the meats furnished by plaintiffs to defendant, and the evidence justified the findings of the court on that issue.

The evidence did show that plaintiffs charged defendant more per pound than they did many other customers, but it justified the

court in finding that the latter purchased an inferior quality of meat, and that the plaintiffs did not charge defendant more than the market price usually charged to others for the same quality or grade.

Order affirmed.

(Opinion published 56 N. W. Rep. 583.)

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SARAH L. COMSTOCK *vs.* SAMUEL MATTHEWS *et al.*

Argued Oct. 9, 1893. Affirmed Oct. 20, 1893.

No. 8306.

55	111
61	524
55	111
79	379

55	111
84	888
55	111
86	898

#### Jurisdiction of Probate Courts.

The Probate Code (Laws 1889, ch. 46) only authorizes the presentation to the Probate Court of claims against the estates of deceased persons arising on contract.

#### Claim arising on tort may be prosecuted in the District Court.

Where the claim arises on tort, the claimant may bring his action against the personal representative in the District or other Court of competent original jurisdiction.

#### Constitution, Art. 6, § 7, construed.

*Held*, also, that this is not in conflict with Article 6, § 7, of the constitution, giving the Probate Court "jurisdiction over the estates of deceased persons."

Appeal by defendants, Samuel Matthews and Thomas Nolan, executors of the will of Thomas Dunn, deceased, from an order of the District Court of Dakota County, *W. C. Williston, J.*, made September 13, 1892, overruling their demurrer to the complaint.

The complaint stated that plaintiff, Sarah L. Comstock, owned one hundred and twenty acres of land in section two (2) township forty-one (41) north of range ten (10) west in Washburn County, Wisconsin. That Thomas Dunn, deceased, in 1879 unlawfully cut on the land and carried away to Stillwater, Minnesota, 301,000 feet of logs and lumber and there converted the same to his own use, to plaintiff's damage \$602. That Dunn died testate February 7, 1892, and that defendants were on March 14, 1892, duly appointed ex-

ecutors of his will. That when the trespass was committed plaintiff was an infant and that she was still under twenty-one years of age. She demanded judgment for \$602, and interest thereon from January 1, 1880 and costs.

To this complaint the defendants demurred on the ground that the District Court had not jurisdiction, that the plaintiff's claim should have been presented for allowance in the Probate Court. The demurrer was overruled and defendants appeal.

*Searles & Gail*, for appellants.

*Clagett & Stowe*, for respondent.

MITCHELL, J. The common-law as well as the statutory rule is that all causes of action by one against another which do not die with a person survive to the personal representative of the former and against the personal representative of the latter.

The present Probate Code (Laws 1889, ch. 46, § 107) only prohibits the bringing of actions at law for the recovery of money against the personal representative upon claims which may be presented to the probate court.

Section 104 of the same Code authorizes the presentation to the Probate Court only of claims arising upon contract, evidently intending to leave those having claims arising on tort to establish them in an ordinary action at law against the personal representative.

This being an action to recover damages for a tort committed by defendant's testate upon the property of the plaintiff, there is nothing in the statute prohibiting it from being brought in the District Court. In fact, if the statute is to control, this was plaintiff's only remedy. Appellants practically concede this to be so, but contend that Article 6, § 7, of the Constitution, which provides that the Probate Court "shall have jurisdiction over the estates of deceased persons," gives that court exclusive jurisdiction over all claims against such estates, whether arising on contract or tort, and that it is not competent for the legislature to confer such jurisdiction on any other court. It would seem to logically follow from this position that under the constitution the Probate Court has exclusive original jurisdiction of all matters collaterally involved in the disposition of the estates of deceased persons from the time of the death of the owners until the property has been placed in

the possession of those to whom it devolves whenever the determination of such matters becomes necessary to a full realization of the rights of creditors, heirs, legatees, distributees, and devisees.

While by a process of gradual development most American Probate Courts have been invested with much larger powers than the early English testamentary courts, yet in none of them has there ever been vested any such extensive powers. Ordinarily, the functions of such courts have been limited to the control of the devolution of property upon the death of the owner, and have not been extended to collateral matters involving controversies between the estate and third parties. These, if an adjudication of them becomes necessary, have generally been left to be tried in the appropriate action in the courts of general jurisdiction. The practice of requiring claims for money against the estate to be presented, in the first instance, to the Probate Court, although now quite general, is of comparatively recent origin. Formerly if such a claim was disputed, the claimant was put to his action against the personal representative in a common-law court of competent jurisdiction, and, if there determined in his favor, the claim would be paid in the regular course of administration in the Probate Court. Conceding, as we may, and probably must, that under the constitution the jurisdiction of the Probate Court over the estates of deceased persons, for the purposes of administration, properly so called, is exclusive, yet in determining the nature and extent of the jurisdiction intended to be conferred on this court it is proper to consider what jurisdiction over such estates was, at the time of the adoption of the constitution, usually vested in Probate Courts, and especially in those of this Territory. On reference to the laws of the Territory then in force, we find that while the general rule was that claims for money against the estates of deceased persons were required to be presented in the first instance to the Probate Court, yet either party might appeal to the District Court, where the matter was tried *de novo*; and under certain circumstances the claimant was permitted to bring his action in the first instance against the personal representative in any court of competent jurisdiction. If a party had any cause of action other than for money against the estate,—as, for example, to enforce performance of a contract of the deceased pertaining to real estate,—he was left to his ordinary action in the District Court.

In view of this state of the law at the date of the adoption of the constitution it seems clear to us that jurisdiction to try and determine controversies arising between the estate and third parties has never been considered an essential or necessary part of the administration of estates vested in Probate Courts, and that in giving that court jurisdiction "over the estates of deceased persons" it was never designed to give it exclusive jurisdiction to try and determine controversies incidentally arising in the course of the settlement of such estates over claims of third parties against an estate. The constitution specifies the general subject of the jurisdiction of that court without defining its extent, which is apparently left, under certain limitations, to be fixed by statute. Undoubtedly the legislature may, as a matter of convenience, commit the determination, in the first instance, of such matters, to the Probate Court; but there is, in our opinion, nothing in the constitution to prevent them from providing that, in case of all disputed claims against the estate, the claimant may or shall bring his action against the personal representative in some other court of competent jurisdiction; in fact, unless otherwise expressly provided, that would be his only remedy. Under the present Probate Code, such is the case as to claims arising on tort.

The result is that this action was properly brought in the District Court, and the order overruling the demurrer must be affirmed.

(Opinion published 56 N. W. Rep. 583.)

## DANIEL W. HAM vs. ANDREW B. JOHNSON.

Argued Oct. 12, 1893. Affirmed Oct. 24, 1893.

No. 8375.

**Specific performance of contract to sell real estate.**

Courts of equity will not specifically enforce an executory contract unless it be complete and certain in all of its material and essential terms, or capable of being made complete and certain by reformation.

Appeal by plaintiff, Daniel W. Ham, from a judgment of the District Court of Hennepin County, *Henry G. Hicks, J.*, entered June 14, 1893, adjudging that he take nothing by this action and that he pay \$39.23 costs.

On January 3, 1891, Andrew B. Johnson, the defendant, made a written contract with plaintiff to convey to him by warranty deed all of section twenty one (21) in Township 140, Range 45, and the southwest quarter of the southeast quarter of section twenty nine (29) in Township 140, Range 44 in Clay County, and "lot three (3) in block one (1) in Bloom's Subdivision Addition to Minneapolis," subject to a mortgage on the lot for \$1,700. Ham by the contract agreed on his part to assign and convey to Johnson his leasehold interest for ninety seven (97) years in fractional block twenty three (23) in Snyder & Co.'s First Addition to Minneapolis and the seven buildings thereon, "and also to convey to Johnson two lots in Belmont Park, subject to a mortgage of \$200 on each." One of the houses on the block was Ham's homestead in which he resided with his wife and family.

Johnson subsequently refused to perform the contract and thereupon Ham brought this action to reform the contract by inserting after the words "Bloom's Subdivision," the words, "of lots twenty four (24) and thirty two (32) of Lawrence & Reeves' out lots," and by striking out the words, "in Belmont Park," and inserting in their place the words, "lots eleven (11) and twelve (12) in block two (2) in Belmont Park Addition to Minneapolis;" and he asked for specific performance of the contract when so reformed.

At the trial on December 27, 1892, it was shown that Ham owned four lots in Belmont Park Addition, encumbered by mortgage for



\$200 on each, and that no designation of the two he should convey was ever made by the parties. The Court found that as to whether there was a mutual mistake of fact in reducing the description of the lots in Belmont Park Addition to writing and as to the property to be conveyed, the evidence was conflicting and was not clear and convincing; that Ham pointed out on a map of Minneapolis the general location of the lots referred to, and represented that each lot was worth \$600; that he subsequently tendered a deed of two of the lots selected by him; that the erroneous descriptions in the contract as signed were inadvertently made by the draftsman who reduced the contract to writing and that it was signed by each party under a mutual mistake of fact, each supposing that it did correctly describe the property intended to be conveyed. As a conclusion of law the trial court found and directed judgment, that plaintiff take nothing and that defendant recover his costs and disbursements. Judgment was so entered and plaintiff appeals. In this Court the parties argued questions relating to the Homestead of Ham as affecting the contract, but did not discuss the question on which the decision turned.

*George H. Benton*, for appellant.

*Peterson & Kolliner*, for respondent.

**COLLINS, J.** This action was brought to reform a certain written agreement made by these parties in relation to the exchange of property, so as to correctly express the real contract made by them, and also for a specific performance of the contract as reformed and corrected. The trial court found that, by the terms of the contract as written, the defendant had agreed to convey to plaintiff, by deed of warranty, and upon prompt performance by the latter of his part of the contract, certain described tracts of land in Clay county, and also, subject to a mortgage for \$1,700, a certain lot in the city of Minneapolis, in consideration of which the plaintiff had agreed to convey to defendant a leasehold estate held by him upon a fractional block of land in said city, created by a ground lease thereof for ninety-seven years, executed by the owner, with the buildings thereon situated, and also certain subleases held upon the same real property, and plaintiff was also to convey to defendant by warranty deed, but subject to specified mortgages, "two lots in Belmont

Park." There were other stipulations in the contract, of no consequence here for a proper determination of the case.

In the complaint it was alleged, as a ground for reformation and correction of the contract, that it was agreed between the parties that plaintiff should convey to defendant lots Nos. 11 and 12, in block number 2, in Belmont Park Addition to Minneapolis, Hennepin county, Minnesota, according to the plat of said addition of record in said county, but that, By mistake of the draughtsman who reduced the contract to writing, said property was erroneously and defectively described in the words before quoted, which, it is alleged, (and of this there can be no doubt,) described no property at all; and that "in such defective and incomplete condition the written contract was signed and executed by the parties, under a mutual mistake of fact as to its contents."

In passing on these allegations which were put in issue by the answer, the trial court found "that as to whether there was a mutual mistake of fact in reducing said description to writing, and as to what property or lots was intended thereby to be conveyed, the evidence thereon is not clear and convincing except that it does appear that the plaintiff, at the time of making said contract, was the owner of four lots in Belmont Park Addition to the City of Minneapolis; that he pointed out the general location of said lots to defendant on a map of the city," and stated their value. The correctness of this finding is not questioned by any of appellant's assignments of error, and it is obvious that, with it in existence, the court could not reform or correct the written contract, and as a consequence could not decree a specific performance of it, in whole or in part. The contract signed by the parties was incomplete, uncertain, and defective, and could not be made complete or certain, nor could the defect be remedied, according to the findings of fact, and no part of it had been executed. There was nothing to enforce. It is elementary that courts of equity will not specifically enforce any executory contract unless it be complete and certain in all of its material and essential terms, or capable of being made complete and certain. The subject-matter of a contract is one of these terms, and, unless so well defined and described that it can certainly be identified and located by means of extrinsic explanatory evidence, properly admissible in such a

case, the contract is incomplete, uncertain, and wholly incapable of enforcement. A description of property must be so definite as to show what the purchaser supposed he was contracting for, and what the vendor intended to sell, and as to enable the court to ascertain what it is by proper evidence. Pom. Spec. Perf. §§ 145, 152; Fry, Spec. Perf. §§ 317, 325, and cases cited. See, also, *Lanz v. McLaughlin*, 14 Minn. 72, (Gil. 55;) *Pierson v. Ballard*, 32 Minn. 263, (20 N. W. Rep. 193;) *Nippolt v. Kammon*, 39 Minn. 372, (40 N. W. Rep. 266.)

The very marked difference between the attempted description in the case at bar and that before us in *Brown v. Munger*, 42 Minn. 482, (44 N. W. Rep. 519,) cited by counsel in the argument, need not be pointed out at this time. As this appeal is already disposed of, we are not required to consider other questions involved. Judgment affirmed.

(Opinion published 56 N. W. Rep. 584.)

Application for reargument denied Nov. 1, 1893.

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STATE *ex rel.* SAMUEL MATHEWS *et al.* vs. ERIC OLSON.

Submitted on briefs Oct. 3, 1893. Affirmed Oct. 24, 1893.

No. 8356.

**Refunding invalid tax paid by purchaser at tax sale.**

As the county commissioners are not the real parties in interest in a proceeding under the provisions of the general tax law, Laws 1881. ch. 10, § 21, amending 1878 G. S. ch. 11, § 148, any statements or admissions made by them upon the presentation of the petition therein provided for, as to the facts therein alleged, cannot affect or bind the state.

**Same—Practice on mandamus to compel refundment.**

Where an information on which is based an application for an alternative writ of mandamus to compel a board of county commissioners to make the certificate prescribed in said section 148 fails to state that said board has inquired into the truth of the facts alleged in said petition, or to state the result of such inquiry, or to state that said board has refused to make the inquiry provided for, the application must be denied.

Appeal by relators, Samuel Mathews and Peter Jourdain, from an order of the District Court of Kanabec County, *F. M. Crosby, J.*, made April 4, 1893, denying their application for an alternative Writ of Mandamus.

On March 27, 1893, the relators presented their petition to the Board of County Commissioners of Kanabec County, stating that at a sale of lands made by the County Auditor of that County in 1881 for nonpayment of delinquent taxes for 1879 and prior years, they bid and became the purchasers of certain described pieces of land and received certificates of purchase thereof and paid into the County Treasury therefor certain specified sums of money. That they never had possession of any of the lands so sold. That the sales and the tax judgment under which they were made were void, because the Court rendering the judgment never had jurisdiction, and that it had been since so adjudged. They offered to surrender the certificates and asked that the money paid by them at the sale and subsequently for later taxes on the lands be refunded, with interest at the rate of ten per cent. a year. The Board took no action in the matter but in the discussion orally admitted that the facts were fully and fairly stated in the petition.

On March 30, 1893, Mathews and Jourdain presented their relation to the District Court stating that they had petitioned the Board and that it admitted the facts were fully and fairly stated in the petition, but that the Board refused to certify that such petition fully and fairly stated the facts affecting the sale under which the certificates were issued and stating that the Board refused to issue any certificate in reference thereto. The relation failed to state that the Board had inquired, or had been requested to inquire, or had refused to inquire, or to certify to the State Auditor, that it had made inquiry into the truth of the facts alleged in the petition and was satisfied that all the facts were fully and fairly stated therein. They prayed that Court to issue its alternative Writ of Mandamus commanding Eric Olson and the other members of the Board to forthwith make a certificate, as provided by Laws 1881, ch. 10, § 21, or show cause before the Court at a time to be specified in the Writ why they refuse so to do.

The Court refused to grant the Writ, and from the order refusing it, the relators appeal.

*J. C. Nethaway*, for appellants.

The only duty the commissioners have to perform is to examine into the truth of the facts alleged in the petition and if it be found that it fully and fairly states all the facts, they should so certify to the State Auditor. The petition presented to the Court below alleges that upon presentation of said petition to the Board, the members thereof stated to the relators that the facts were fully and fairly stated in said petition and were true, but in the face of this admission they refused, after demand, to give relators any certificate as required by Laws 1881, ch. 10, § 21. This act has been sustained in *State ex rel. v. Dressel*, 38 Minn. 90.

The relators are placed in a peculiar predicament. They have paid the taxes on the lands for the owners, the County has had the benefit of the payment. The original owners remain silent, knowing that this Court has declared relators' tax title invalid. The Legislature has given relators a remedy and it is unjust that an obstinate Board of County Commissioners should sit by and clog further progress.

When relators purchased the certificates, Laws 1881, ch. 10, was in force and became part of their contract with the County. *Fleming v. Roverud*, 30 Minn. 273; *State ex rel. v. Foley*, 30 Minn. 350; *Covell v. Young*, 11 Neb. 510; *McCann v. Merriam*, 11 Neb. 241.

*J. C. Pope*, *H. W. Childs* and *George B. Edgerton*, for respondents.

If valuable timber was in fact removed from the lands equal in value to the amount paid by the relators, their right to repayment was thereby defeated. Laws 1889, ch. 2, § 21. The petition should have recited that no such timber had been removed, or if otherwise, the amount and value thereof should have been stated.

The law implies that the Commissioners shall be furnished with the proper evidence of the relators' rights. They are not called upon to hunt up the evidence of the facts. *Corbin v. Morrow*, 46 Minn. 522. They are not restricted to an examination as to the truth of the facts alleged in the petition. They are bound to inquire into the fullness of the statement of facts and their duty is not performed until they shall have made proper investigation. It

should appear affirmatively in the moving papers that such investigation was made, and that thereupon the Board of County Commissioners determined by official and final action that the facts were fully and fairly stated.

COLLINS, J. The information on which the relators in this action based their application for an alternative writ of mandamus was insufficient and defective in at least one very material respect. It failed to state that the board of county commissioners had inquired into the truth of the facts alleged in the petition presented by the relators under the provisions of section 148 of the general tax law, found in Laws 1881, ch. 10, § 21; and of course it failed to state the result of such an inquiry, nor was it alleged in the information that the board had refused to make an inquiry.

Section 148 provides that upon the presentation of a petition setting forth the facts claimed to invalidate a tax certificate the Commissioners shall inquire into the truth of the facts alleged, and, if satisfied that all of the facts affecting the case are fully and fairly stated, they shall make the certificate which the relators are attempting to obtain through the present proceeding. The only allegations found in the information relating to the action of the Commissioners are that when the petition was presented they "stated to the relators that the facts were fully and fairly stated in said petition, and were true, but the said County Commissioners, after demand duly made by your relators, refused to certify, \* \* \* and still do refuse to so certify."

The statements or admissions set forth in the information as having been made when the relators presented their petition were wholly immaterial, for the state cannot be affected or bound by any statements or admissions of this character, made by the County Commissioners. They are not the real parties in interest in an attempt to secure the refunding of money paid for tax certificates. The statute expressly provides for an investigation by the Commissioners into the truth or falsity of the alleged facts, and, further, that when satisfied that all of the facts affecting the case have been fully and fairly stated in the petition, the certificate shall be made by the Commissioners. As before stated, the information failed to allege

that the Commissioners had performed, or had refused to perform, the duty imposed by statute, and hence the court below was justified in denying relators' application.

Order affirmed.

(Opinion published 56 N. W. Rep. 585.)

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AUGUST SCHILLING *et al.* vs. DANIEL MULLEN, JR., *et al.*

Argued Oct. 11, 1898. Affirmed Oct. 24, 1898.

No. 8382.

**Parties to an action on a partial assignment of a claim.**

An action to recover a duly-assigned portion of a demand or obligation may be maintained where the assignee and assignor are joined as plaintiffs, or where the latter, not joining as plaintiff, is made a defendant, so that the whole controversy may be determined in one suit.

**Notice fixes the rights of the parties.**

Notice of an assignment of a demand or obligation, or a part thereof, given to the debtor, fixes the rights of the parties, and protects the assignee.

**Payment to the assignor after notice will not prejudice assignee.**

Where the amount earned by an employe, after notice to an employer of the assignment of a portion of the wages to be earned, exceeds the amount due upon a claim or demand held by the latter against the former at the time of such notice, recovery upon the assignment cannot be defeated by the employer on the ground that he has paid over such excess to the employe.

Appeal by defendant, Daniel Mullen, Jr., from an order of the District Court of Ramsey County, *Hascall R. Brill*, J., entered February 28, 1893, against him for \$103.33 and costs.

On January 2, 1892, the defendant, Michael J. McFadden, sold and delivered to defendant, Daniel Mullen, Jr., his stock of confectionery goods and store fixtures and entered into a written contract with Mullen to work for him as clerk in the business for one year from that date, and to give Mullen the use of his name and his tools in the

manufacture and sale of confectionery. Mullen agreed to pay him a salary of eighteen dollars a week. The plaintiffs, August Schilling and six others, recovered judgment January 12, 1892, against McFadden for \$93.27 and instituted proceedings supplemental to execution. McFadden settled with plaintiffs February 16, 1892, by assigning to them fifteen dollars a month of his salary and by giving them an order on Mullen to pay plaintiffs out of his salary fifteen dollars on the tenth day of each month, until their judgment interest and costs should be fully paid. On the next day plaintiffs notified Mullen of the assignment and gave him a copy of the order. They demanded these monthly installments as they became due, but obtained nothing. In December, 1892, plaintiffs requested McFadden, who was still at work for Mullen, to unite with them in an action against Mullen to recover the money, but he refused. Plaintiffs then brought this action against Mullen and joined McFadden as a defendant with him. The complaint stated the facts and prayed judgment directing Mullen to pay plaintiff's claim.

The defendant Mullen answered stating as counterclaim that McFadden was owing him \$100 when the copy order was handed to him, no part of which had been paid. He also answered that on March 10, 1892, McFadden revoked the order and directed him to pay plaintiffs nothing and demanded that his wages be paid to him personally each week; and that he had paid McFadden accordingly in full. McFadden answered that Mullen had paid him for his services in full as the services were performed and owed him nothing. Plaintiffs moved for judgment on the pleadings and the Court granted it, saying; "Equity will protect such an assignment and compel payment by the debtor to the assignee of the part assigned. *Field v. McMahon*, 6 N. Y. 179; *Brill v. Tuttle*, 81 N. Y. 454. In an action at law it is different. *Carter v. Nichols*, 58 Vt. 553. If notified of the partial assignment it is immaterial that the debtor has paid the assignor. *Banks v. Bayonne*, 48 N. J. Eq. 246." Judgment was entered accordingly and the defendant Mullen alone appeals.

*Leon T. Chamberlain*, for appellant.

This Court has decided in *Dean v. St. Paul & D. R. Co.*, 53 Minn. 504, that an action at law cannot be maintained by the assignee of



a part of a claim against a debtor, without his consent to the severance of the part from the whole, but indicates that an action in equity may be sustained if all interested parties are brought in, so that the whole case may be settled at one time. This seems to be the doctrine laid down in the cases cited by His Honor, Judge Brill, in his memorandum. But the case at bar has other elements which are controlling.

The parties to the assignment could not change the contract of Mullen to pay weekly or excuse him from so paying, nor could they compel him to pay at a different time from the time prescribed by his agreement. If they have failed to designate out of which weekly payment of \$18 the monthly installment is to be taken, can they impose upon the employer the obligation to select which he will deduct the payment from? They could not compel Mullen to hold and accumulate the payments. *Dean v. St. Paul & D. R. Co.*, 53 Minn. 504.

Mullen had the right to set off his counterclaim. *State ex rel v. City of Lake City*, 25 Minn. 404; *Davis v. Sutton*, 23 Minn. 307.

To bind an employer to recognize partial assignments of future wages will lead to complications and difficulties to which he cannot be subjected without his consent. *Carter v. Nichols*, 58 Vt. 553; *Mandeville v. Welch*, 5 Wheat. 277; *Gibson v. Cook*, 20 Pick. 15.

*Johnson W. Straight and Leonard A. Straight*, for respondents.

This is a suit in equity in which such partial assignments are held valid and enforceable against the fund holder without his consent and even against his most strenuous objections. *Caldwell v. Hartup & Co.*, 70 Pa. St. 74; *Risley v. Phoenix Bank*, 83 N. Y. 318; *Exchange Bank v. McLoon*, 73 Me. 498; *Grain v. Aldrich*, 38 Cal. 514; *Des Moines Co. v. Hinkley*, 62 Iowa, 637; *Phillips v. Edsall*, 127 Ill. 535; *Wood v. Wallace*, 24 Ind. 226; *James v. City of Newton*, 142 Mass. 366; *Trist v. Childers*, 21 Wall. 441; *Brice v. Bannister*, 3 Q. B. Div. 569; *Addison v. Cox*, L. R. 8 Ch. Appl. Ca. 76.

A debtor can assign his wages to be earned in the future under an existing contract with his employer, whether such employment be by the piece, day, week or month and such assignment will be

fully protected by courts of equity. *Garland v. Harrington*, 51 N. H. 409; *Bank of Harlem v. City of Bayonne*, 48 N. J. Eq. 246; *Hartley v. Tapley*, 2 Gray, 565; *Boylan v. Leonard*, 2 Allen, 407.

COLLINS, J. In *Canty v. Latterner*, 31 Minn. 242, (17 N. W. Rep. 385,) it was determined, in accordance with the weight of authority, that an assignment of a part interest in a demand or obligation might be made, and that the courts would recognize and protect the equitable interest of the assignee. This doctrine was referred to in *Dean v. St. Paul & Duluth R. Co.*, 53 Minn. 504, (55 N. W. Rep. 628,) where the real question was whether a separate and independent action could be maintained by the assignee to recover his share of the demand, the debtor refusing to recognize the assignment. The conclusion of the court was that such an action would not lie, but it was said, in substance, that where the assignor and assignee were joined as plaintiffs, or the former, not joining, was made a defendant, so that the whole controversy might be settled in one suit, the action could be sustained. By means of proper allegations in the complaint, the assignor, McFadden, was made a party defendant to this action, and on this branch of the case the court below ruled correctly when ordering judgment for plaintiffs on the pleadings.

In addition to the one just disposed of, several points are made by appellant's counsel, only one of which needs special consideration. The others are without merit. The plaintiff's claim was a little less than \$100 when they obtained the assignment from defendant McFadden. In his answer defendant Mullen alleged that prior to the time of the execution and delivery of such assignment, and consequently before he had notice of it, McFadden had received from him a sum exceeding \$100 upon a promise to return and repay the same; that he had not returned or repaid any part thereof; and that the whole remained due and unpaid. These allegations constituted, it is claimed, a complete defense to plaintiffs' cause of action, because they would have been a perfect defense, by way of counterclaim, if found in an answer interposed in an action for services brought by McFadden against Mullen.

From the pleadings in this action it clearly appears that under McFadden's contract with Mullen the former had earned a trifle less than \$800 between the day upon which due notice of the as-

signment was served on the latter and the day this action was brought, some eleven months, and it was alleged in Mullen's answer that he had fully paid McFadden for the services admitted to have been rendered, as before stated, so that it may be taken as conclusively shown that, when this action was commenced, the former was indebted to the latter about \$700, over and above all set-offs, or that, subsequent to notice of the assignment, he had paid over about that sum to McFadden, ignoring the fact, which had been brought to his knowledge, that these plaintiffs had an assignment for a portion of it. If he still owes the amount earned, the plaintiffs are entitled to the sum which McFadden assigned and ordered to be paid over to them. If, upon the other hand, Mullen has paid over to McFadden the entire amount of his earnings, thus paying over money which belonged to plaintiffs, and in total disregard of the assignment, the loss, if any, will have to be sustained by Mullen, not by plaintiffs. The notice of assignment duly served upon Mullen fixed the rights of all parties, and protected the assignees. The effect of such assignment and notice could not be avoided, directly or indirectly, by anything Mullen might do.

Judgment affirmed.

(Opinion published 56 N. W. Rep. 536.)

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STATE OF MINNESOTA vs. S. D. RAYANTIS.

Argued Oct. 10, 1893. Reversed Oct. 24, 1893.

No. 8405.

**City ordinance of Minneapolis construed.**

An ordinance of the city of Minneapolis which provides "that no person shall erect \* \* \* or maintain any \* \* \* structure; or leave, deposit, or place any \* \* \* carts \* \* \* in or upon" any of the streets is not violated when a duly-licensed "push-cart peddler" remains, with his cart, at one certain place upon one of the busiest thoroughfares in said city a half hour, for the purpose of selling his wares.

Appeal by defendant, S. D. Rayantis, from a judgment of the Municipal Court of the City of Minneapolis, *Charles B. Elliott, J.*, entered June 30, 1893, adjudging him guilty of a violation of a

city ordinance and fining him \$50 and in default of payment committing him to the workhouse until it be paid, not exceeding sixty days.

The Charter of the City of Minneapolis, Sp. Laws 1881, ch. 76, subch. 4, § 5, subd. 6, provides that the City Council shall have power to pass ordinances to prevent the incumbering of streets with carriages, carts, wagons or sleighs. The City Council accordingly passed the ordinance against unlawful practices in streets, under which defendant was prosecuted. The ordinance reads as follows:

No person shall erect, build, set up, keep or maintain any house, store, shop or other building or structure, or leave, deposit or place any boxes, merchandise, timber, planks, boards, shingles, casks, barrels, hogsheads, lumber, brick, stone, trucks, carts, wagons, sleds or carriages, upon or in any street, alley or sidewalk in the City of Minneapolis.

The language of the complaint is, That defendant did wilfully, unlawfully and wrongfully obstruct that certain street known and designated as Nicollet Avenue in said City, by then and there placing and leaving in said street an obstruction, to wit, a push cart, commonly so called.

The trial judge filed a note in the case, saying: "The defendant holds a license to peddle, but I do not understand that it entitles him to establish a fruit store in the street. A peddler is one who goes from place to place and carries about with him small articles for sale. *Higgins v. Rinker*, 47 Tex. 402. A license to peddle does not authorize one to place a structure four feet wide and eight or ten feet long on a busy street and remain permanently in one place."

*Geo. H. Benton*, for appellant.

A licensed push-cart peddler while prosecuting his business stopping half an hour at the curbstone and exposing his fruit for sale, without moving along, is not guilty of violating the ordinance prohibiting unlawful practices in streets. *Graves v. Shattuck*, 35 N. H. 257; *Sikes v. Town of Manchester*, 59 Iowa, 65; *Wood v. Mears*, 12 Ind. 515.

A partial and temporary obstruction of a street by a push-cart peddler is justifiable for the convenience of citizens. The right to

do so exists at common law, and the obstruction occurs in the customary and contemplated use of the street. *Cushing v. Adams*, 18 Pick. 110; *Congreve v. Smith*, 18 N. Y. 78; *Rex v. Russell*, 6 East, 427; *Dickey v. Maine Tel. Co.*, 46 Me. 483; *People v. Cunningham*, 1 Denio, 524.

The ordinance against unlawful practices in streets (charter and ordinances of Minneapolis of 1888, page 1003) does not apply to a duly licensed push-cart peddler. *Brown v. Maryland*, 12 Wheat. 419; *City of St. Paul v. Laidler*, 2 Minn. 190.

*David F. Simpson and M. D. Purdy*, for respondent.

The obstruction to Nicollet Avenue produced by defendant's push cart standing there for half an hour on the morning of June 28, 1893, must be conceded as coming within the class of partial and temporary obstructions not reasonably necessary. *Callanan v. Gilman*, 107 N. Y. 360; *Commonwealth v. Passmore*, 1 Serg. & R. 219.

A merchant may have his goods placed in the street for the purpose of removing them to his store in a reasonable time. But he has no right to keep them in the street for the purpose of selling them there, because there is no necessity for it. *Rex v. Russell*, 6 East, 427; *Rex v. Cross*, 3 Campb. 224; *Higgins v. Rinker*, 47 Tex. 402; *Commonwealth v. Fenton*, 139 Mass. 195.

The City Council, broad and comprehensive as its police powers are, cannot nor can the Legislature itself authorize the permanent obstruction of a public highway for private purposes. Any permanent obstruction of a street, although only partial in its nature, is a nuisance *per se*. In England not even the King could authorize the permanent obstruction of the public highway. *State v. Berdetta*, 73 Ind. 189; *Cohen v. Mayor of N. Y.*, 113 N. Y. 532; *Masterson v. Short*, 7 Robt. (N. Y.) 299; *Village of Pine City v. Munch*, 42 Minn. 342.

**COLLINS, J.** Defendant was convicted in the municipal court of the city of Minneapolis of a violation of a section of one of the ordinances providing "that no person shall erect, build, set up, keep, or maintain any house, store, shop, or other building or structure; or leave, deposit, or place any boxes, merchandise, \* \* \* trucks, carts,

wagons, sheds, or carriages upon or in any street \* \* \* in said city." It was admitted that at the time of the alleged offense defendant was a duly-licensed "push-cart peddler," and from the evidence for the prosecution it appears that he was arrested by a policeman solely because he had remained with his cart, on the platform of which fruit was exposed for sale, standing close up to the curb of the sidewalk for a full half hour,—without making any sales,—at a certain point upon Nicollet avenue, one of the busiest thoroughfares in the city.

It was not claimed that defendant's cart interfered with or obstructed the travel, although, of course, no other vehicle could occupy the same space in the street during the half hour. This was the extent of the offense as shown by the testimony. The conviction cannot be sustained upon such a showing. The ordinance in question does not cover such a case, nor was there an intent on the part of the city council that it should. It was solely designed to prevent the incumbering of streets with structures or articles which would necessarily impede and obstruct, in a somewhat permanent manner, the proper use of the streets by the traveling public. It was never intended to cover or include the enumerated vehicles, or any other, while they were in use, whether in motion or stopped temporarily for the convenience of the owner or occupant. If so, there could be no distinction made between the fruit peddler who pushes his cart up to the walk that he may find customers, and the citizen who stops his carriage at the curb that he may gossip with a neighbor. Both would be within the inhibition, and liable to arrest.

The ordinance under which defendant obtained his license contains no provisions defining or regulating the manner in which a push-cart peddler shall conduct his business. He is therefore under no specified restrictions, and is authorized to peddle from place to place within the city limits, and to carry with him upon his cart articles of merchandise for sale. He is not required to move continually, but may stop for the purpose of making, or endeavoring to make, sales. If there is anything offensive in the business itself, or if those engaged in it so conduct themselves as to obstruct the streets, or become nuisances, the city council, exercising the same power which it exercised when passing an ordinance compelling

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these street vendors to first obtain a license, can easily and successfully regulate and control their manner of doing business. It was under such an ordinance that the prosecution considered in *Commonwealth v. Fenton*, 139 Mass. 195, (29 N. E. Rep. 653,) cited by respondent's counsel, was had.

Because defendant was not guilty of an offense contemplated and covered by the ordinance under which he was convicted, the judgment is reversed.

(Opinion published 56 N. W. Rep. 586.)

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*In re* FRANK NICOLIN, Insolvent.

Argued Oct. 5, 1893. Affirmed Oct. 24, 1893.

No. 8365.

**Practice in insolvency. Who may petition to remove an assignee.**

Any person to whom an insolvent is actually indebted is a "creditor," within the meaning of Laws 1889, ch. 30, § 6, (an amendment to the insolvency act of 1881,) and such creditor need not file his claim with the assignee or receiver in order to take part in proceedings, therein provided for, to remove such assignee or receiver.

**Same—Hearing upon an order to show cause.**

A petition under that statute is properly heard upon order to show cause, and at the hearing the court may ascertain through competent proofs, and determine, as a fact, whether a majority of the creditors, in number and in amount, have signed such petition.

Appeal by Frank Nicolin, assignor, and Gerhard Hilgers, his assignee, from an order of the District Court of Scott County, *Francis Cadwell*, J., made May 25, 1893, removing said Hilgers and appointing Theodore Weiland assignee in his stead.

On March 27, 1893, Frank Nicolin, merchant of Jordan in Scott County made an assignment under Laws 1881, ch. 148, of all his non-exempt property to Gerhard Hilgers of the same place in trust for the equal benefit of all his creditors who should prove their claims and release him from any part thereof not paid from the proceeds of the property assigned. His schedule of indebtedness was

filed April 4, 1893, showing his debts to be \$160,465 and the names of his creditors, 339 in number. On May 5, 1893, George Mitsch and over two hundred others claiming to be creditors of Nicolin to an aggregate amount exceeding \$100,000 petitioned the District Court to remove Hilgers and appoint Theodore Weiland of Shakopee in his stead. That Court made an order requiring Nicolin and Hilgers to show cause if any they had, on May 8, 1893, why the petition should not be granted. After hearing the parties the Court granted the petition and transferred the trust estate to Weiland and directed Hilgers to deliver possession; and to file and settle his account. No creditor had filed proof of his claim and the only evidence presented of the number of creditors and the amount of their several claims was the schedule of liabilities made and filed by the assignor, pursuant to 1878 G. S. ch. 41, § 24. Nicolin and Hilgers objected that this was insufficient proof that the petitioners were creditors and a majority in number and amount under Laws 1889, ch. 30, § 6. The objection was overruled. They excepted and appealed and now assign this ruling as error.

*H. J. Peck and Freeman P. Lane*, for appellants.

This Court has determined who are creditors under our insolvency act. *Adamson v. Cheney*, 35 Minn. 474; *Olson v. O'Brien*, 46 Minn. 87; *In re Scott, Collins & Co.*, 15 Nat. Bank. Reg. 73; *In re Brisco*, 2 Nat. Bank. Reg. 226.

The District Court of Hennepin County, all judges concurring, has held as appellants contend, but the Court below refused to recognize or follow the ruling.

*Davis, Kellogg & Severance and Southworth & Collier*, for respondents.

There is no settled case or bill of exceptions in the record and these alleged errors are predicated upon recitals contained in the order as to what took place at the hearing. Questions arising upon the evidence or upon the rulings of the Court can be brought up for review only by bill of exceptions or settled case. *St. Anthony Mill Co. v. Vandall*, 1 Minn. 246; *Prouty v. Hallowell*, 53 Minn. 488.

As appellants are unable to show error affirmatively upon the



record the order appealed from must be affirmed. *Teller v. Bishop*, 8 Minn. 226; *Blackman v. Wheaton*, 13 Minn. 326; *Flibotte v. Mullen*, 36 Minn. 144.

In construing a statute the words used will be taken to have their ordinary meaning, unless an intent that they should be understood in a different or more restricted sense is clearly manifest in the statute itself. A "creditor" is a person to whom a debt is owing by another person called a "debtor." There is nothing in this statute to show that "creditor" was here used in a different sense. *Citizens' Nat. Bank v. Minge*, 49 Minn. 454. Our insolvency law is not identical in its terms with the United States Bankrupt Law of 1867, and the practice under it should not be the same when its terms are radically different.

Under U. S. R. S. §§ 5019, 5032, 5033, the removal by creditors was by such a vote as is provided for the choice of assignee, that is, the vote of the majority in number and amount of the creditors who had proved their claims. § 5039.

The removal of the assignee is to be upon petition of a majority in number and amount of the creditors. The statute is silent as to the procedure. It has left that matter entirely with the Court to determine whether the petition is signed by the requisite number. In the absence of any statutory provision the Court must determine what methods it will pursue in ascertaining these facts. Certainly, a hearing upon order to show cause is the proper method. At such hearing the Court can receive any competent evidence relative to the facts to be ascertained.

If the word "creditor" in our law is to be restricted in its meaning there is no reason for stopping with those who have proved and filed their claims and had them allowed by the assignee. It should be limited to those who have filed releases and thus placed themselves in a position to participate in the dividends.

COLLINS, J. Disregarding the claim of the counsel for respondents that upon the record, as presented on this appeal, there is nothing for us to review, we come directly to a consideration of the main question, and this involves a construction of the word "creditors," as used in Laws 1889, ch. 30, § 6, (an amendment to the insolvency law of 1881, ch. 148.) It is provided in said section that, upon the petition

of a majority in number and in amount of the creditors, it shall be the duty of the court to remove any assignee or receiver appointed under the provisions of the statute, and to appoint another person to the place. It stands conceded that when the petition was filed asking for the removal of the assignee named in the deed of assignment, who had qualified and entered upon the discharge of his duties, and at the time the petition was acted upon by the court, the original assignee being removed, no claims of any description had been filed with the assignee for allowance against the estate. The contention of counsel for appellants is that with this condition of affairs there were no "creditors," within the meaning of the statute, and consequently none qualified to sign a petition for the removal of their client. With this view of the law the court below acquired no jurisdiction of the subject-matter, and its order could not be sustained.

In the ordinary and almost universal definition of the word, a "creditor" is a person to whom a debt is owing by another person, called a "debtor;" and, unless it clearly appears that it was used in a different sense in the statute now under consideration, we should give the word its usual and generally accepted meaning, although it is not an uncommon thing for courts to construe words as having been used in legislative enactments in a limited sense, and with a special or restricted meaning. Two instances may here be referred to where this court when construing this same word, "creditors," as used in other sections of the insolvency act, has held that the popular meaning just mentioned was not intended. *Adamson v. Cheney*, 35 Minn. 474, (29 N. W. Rep. 71;) *Olsen v. O'Brien*, 46 Minn. 87, (48 N. W. Rep. 453.) But the reasons for declaring that the word had a special and limited meaning as used in the sections then being considered are obvious, and neither of the cases are in point here. Nor are the decisions under the national bankruptcy act of 1867, cited by counsel, of value in support of their position, as will be seen upon an examination of the provisions of the act itself, regulating the manner in which assignees were to be selected.

The creditors referred to in the statute of 1889, and upon whom is conferred the right to petition for the removal of an assignee or receiver, are all persons to whom the insolvent may be indebted. The fact of indebtedness, and another essential fact, under the

statute, namely, that a majority in numbers and in amount of the creditors have signed the petition, are to be ascertained and determined by the court upon the production of competent proofs upon the hearing of the petition, and this hearing may properly be had upon order to show cause. No injustice can result to an insolvent or to an assignee or to a receiver by this course of procedure, and the plain purpose of the statute would frequently be frustrated if actual creditors could not petition for the removal of an obnoxious or incompetent person selected by the insolvent himself as assignee, or suggested to the court by some friendly creditor as a receiver, until after their claims had been filed, or, perhaps, as intimated by appellants' counsel, not until such claims had been allowed by the assignee or receiver. Creditors cannot be put at the mercy of assignees or receivers in this way. Valuable rights might be lost, and valuable estates absolutely wasted, before creditors could avail themselves of the statutory remedy, if the construction contended for by counsel should be adopted, and the clear intent of the statute is to the contrary.

The court below proceeded to a consideration of the petition upon an order to show cause, and found that a majority of the creditors, in number and in amount, had signed the same. There is nothing in the record tending to show that the court erred in its conclusion, or reached it in an improper manner.

Order affirmed.

(Opinion published 56 N. W. Rep. 537.)

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HENRY C. COOPER *vs.* ST. PAUL CITY RY. CO.

Motion submitted on briefs Oct. 16, 1893. Granted Oct. 24, 1893.

No. 8253.

**Death of a party after verdict in an action for a tort.**

Where one of the parties dies after the rendition of a verdict in an action brought to recover for personal injuries sustained by the plaintiff through the carelessness or negligence of the defendant, the action does not abate, but may be continued by or against the personal representatives of the deceased, under the provisions of 1878 G. S. ch. 66, § 41.

Motion by Mrs. Cooper, executrix of the will of Henry C. Cooper, deceased, to vacate the proceedings in this Court taken subsequent to his death on August 2, 1893.

Henry C. Cooper was a passenger on October 6, 1891, from Merriam Park east to Marion Street in St. Paul on the Interurban Electric Line of Street Cars along University Avenue. While he was alighting at Marion Street the car was started suddenly and he fell and was injured. He brought this action against the Street Railway Company to recover damages for the injury and on November 10, 1892, he obtained a verdict for \$8,800. The defendant made a motion for a new trial, but was denied and it appealed from the order to this Court. The appeal was argued here on June 16, 1893, and the decision of this Court was filed August 1, 1893, affirming the order refusing a new trial (54 Minn. 379). On the following day the plaintiff departed this life testate. His will was proved and letters testamentary were issued to his widow and she now on notice moves this Court to be substituted as plaintiff in the action in the place of the testator. She also asks that the proceedings in this Court subsequent to his death be vacated.

*A. G. Briggs, for testatrix.*

*McCafferty & Noyes, for Railway Co.*

1878 G. S. ch. 66, § 41, is a general provision covering all actions *ex delicto*, while 1878 G. S. ch. 77, § 1, is a special provision with reference to a particular class of such actions, viz: actions arising out of injury to the person. Under the rules of construction this makes section 1 of chapter 77 an exception to section 41, chapter 66. There is no rule of construction more reasonable or better settled than that special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes so far as there is a conflict. *State ex rel. v. Goetze*, 22 Wis. 363; *Sedgwick*, Stat. Const. § 217; *Felt v. Felt*, 19 Wis. 193.

The statute having created a special cause of action for the representative of a deceased person where death has resulted from a wrongful act, no other can be maintained. If this action can be maintained, then there is either a double liability or else one action is a bar to the other. The money obtained in this action must be assets of the estate, subject to all just debts owing by the dece-

dent. If his debts are greater than his assets, then everything is swallowed up by the debts. The widow or next of kin derive no benefit; but 1878 G. S. ch. 77, § 2, contemplates that if the injured party does not himself obtain compensation for his injuries and dies as the result thereof, his widow and kindred shall not be deprived of pecuniary benefits that would probably have enured to them had he lived and they may recover damages, which are not part of his estate or subject to the payment of the debts of the decedent.

This verdict cannot pass to the executrix, for there is nothing to pass. A verdict in an action *ex delicto* is not property. It has not even such a potential existence as to be assignable. This Court has said: "Such a right has not the ordinary attributes of property and is not a subject of sale and transfer, nor does the rendition of a verdict upon such a cause of action make it assignable. Only by the rendition of a judgment is such a personal right of action converted into a debt." *Hunt v. Conrad*, 47 Minn. 557.

We have been unable to find statutes exactly like the provisions of our statutes herein referred to. New York Code, § 764, provides that "After verdict, report or decision to recover damages for a personal injury the action does not abate," &c. Wisconsin R. S. § 4253, was amended by Laws 1887, ch. 280, so that an action for assault and battery or false imprisonment or other damage to the person shall survive, and the case of *Hiner v. City of Fond du Lac*, 71 Wis. 74, is not in point. *Meese v. City of Fond du Lac*, 48 Wis. 323; *Randall v. Northwestern Tel. Co.*, 54 Wis. 140; *Munro v. Pacific Coast D. & R. Co.*, 84 Cal. 515; *Stout v. Indianapolis, &c., R. Co.*, 41 Ind. 149; *Indianapolis, &c., R. Co. v. Stout*, 53 Ind. 143; *Holton v. Daly*, 106 Ill. 131.

COLLINS, J. This action was brought to recover for personal injuries said to have resulted to plaintiff through the carelessness and negligence of one of defendant's servants while engaged in the operation of an electric car. A verdict was rendered for plaintiff, and from an order denying defendant's motion for a new trial an appeal was taken. August 1, 1893, this court affirmed the order appealed from, 54 Minn. 379, (56 N. W. Rep. 42,) and on the day following plaintiff died. The motion now before us, made in behalf of the executrix of the last will and testament of the deceased,

is that all proceedings had in the action since the plaintiff's death be vacated and set aside, and that she be substituted as the proper party plaintiff. This motion is resisted on the ground that the action died with the plaintiff, and the right to further prosecute the same cannot devolve upon his personal representative. To properly determine this question we are referred to certain provisions found in 1878 G. S. ch. 66, § 41, ch. 77, §§ 1, 2. Section 1 of the last-mentioned chapter declares that a cause of action arising out of an injury to the person dies with the person of either party, except as provided in section 2 of the same chapter. This, save as to the exception, is simply the common-law rule. Said section 2 provides that, when death is caused by the wrongful act or omission of any party, the personal representatives of the deceased may maintain an action, if he might have maintained an action had he lived, for an injury caused by the same act or omission. This action must be brought within a specified period of time after the decease, and the damages recoverable, limited in amount, are for the exclusive benefit of the widow and next of kin, the estate of the decedent not profiting thereby. These two sections, and, in substance, all but the last paragraph of section 41, ch. 66, *supra*, had been in force in this state for many years when, by Laws 1876, ch. 46, there was added to section 41 a separate and independent provision or paragraph, which we regard as controlling this case. As it originally stood, section 41 provided that an action should not abate by the death of a party when the cause of action survived or continued. Then followed regulations in respect to the manner in which the actions referred to should thereafter be conducted. To these provisions was added in 1876, as before stated, the following language: "After a verdict of a jury, decision or finding of a court or report of a referee in any action for a wrong, such actions shall not abate by the death of any party;" and the section, as thus added to, has not been changed by any subsequent legislation. It is evident that these words were not designed to have any effect upon any action which then survived the decease of either party, and could be continued by or against a personal representative. Such were already provided for, no matter when the disability came. It is equally as evident that this

paragraph was incorporated into the statutes for the purpose of reaching a class of actions which theretofore abated when death overtook either party. Unless this be the case, no effect whatsoever can be given the language used, and no such result can be permitted. The language used is broad and comprehensive. Every action brought to redress a wrong seems to have been included, and none are excluded from the operation of the statute. The one now before us was brought by the late plaintiff to redress a private wrong done to his person, and in his lifetime a verdict was rendered in his favor. It was of the class of actions expressly covered by the statute, or the statute itself is meaningless, and it did not abate when he died. No other view could well be taken were there no precedents to be found. But the fact is that this same language when adopted by our legislature was taken from New York. Wait's Ann. Code, § 121. It had also been construed by the courts of that state prior to 1876. *Lyons v. Third Avenue Railroad Co.*, (1867,) 7 Rob. (N. Y.) 605; *Wood v. Phillips*, (1871,) 11 Abb. Pr. (N. S.) 1. In this last case Mr. Justice Rapallo said: "A claim for damages for a purely personal wrong, while it remains unliquidated and unascertained by a verdict, dies with the person, but the intention of the section of the Code above cited seems to be to prevent this result after the claim has been ascertained by a verdict. In that case the verdict becomes property, which passes to the representatives of the deceased as a judgment would at common law. It then becomes the duty of the executor or the administrator to defend it for the benefit of the estate." See, also, the later cases of *Kelsey v. Jewett*, 34 Hun, 11, and *Corbett v. Twenty-Third St. Ry. Co.*, 114 N. Y. 579, (21 N. E. Rep. 1033.)

As a reason why the construction herein adopted should not prevail, it is argued by counsel that this action when continued would not be a bar to another action brought under the provisions of 1878 G. S. ch. 77, § 2, before cited, for the exclusive benefit of the widow and next of kin of the deceased. We are not required to express an opinion as to this, for the question is not in this case, and we should not anticipate its coming in another. In conclusion, we can say that we see no repugnance in the various sections herein cited, and no difficulty in the way of harmonizing

them, so that each may stand and be applied as occasion arises. The clerk of this court will make such entries as will vacate and set aside all proceedings had herein subsequent to the demise of, and in the name of, the original plaintiff, and will also formally substitute the executrix of his last will and testament as plaintiff in this action.

(Opinion published 56 N. W. Rep. 583.)

# STATE OF MINNESOTA vs. BANK OF NEW ENGLAND.

Argued Oct. 20, 1893. Reversed Oct. 27, 1893.

No. 8409.

## Receiver in action under 1878 G. S. ch. 76.

In an action under 1878 G. S. ch. 76, while, before the formal determination of any issue upon the plaintiff's allegations essential to sustain the action, or upon facts alleged in defense, it is discretionary with the court to appoint a receiver or not, yet before such formal determination, if it is admitted that the facts which give the right of action exist, and there is no defense, it will be an abuse of discretion to refuse to appoint a receiver.

## Injunction in same action.

It is the same with regard to issuing an injunction.

## The action under ch. 76 not defeated by assignment under Laws 1881, ch. 148.

When a creditor has commenced an action under that chapter, an assignment by the corporation under the insolvent law of 1881 will not defeat nor impair the creditor's right to the remedy by his action commenced.

Appeal by plaintiff, the State of Minnesota, from an order of the District Court of Hennepin County, *Thomas Canty, J.*, made July 17, 1893, refusing to appoint a receiver and to grant an injunction.

The defendant, the Bank of New England was a corporation having banking powers. It was organized in December, 1891, under 1878 G. S. ch. 33, and was located and doing business in the Guaranty Loan Building at Minneapolis. Its capital was \$100,000.

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57	557
56	139
58	436
56	139
60	356
56	139
66	389
55	139
73	215
73	461
55	189
84	151



The State Treasurer deposited public funds in this Bank under 1878 G. S. ch. 6, § 37, as amended. The Bank became insolvent and unable to pay on demand checks, drafts and orders drawn upon it in the due course of business. On June 24, 1893, it closed its doors and suspended payment. It was indebted to the State \$61,331.15, and to other creditors large sums of money. It owned and had possession of promissory notes, choses in action and property worth over \$100,000. On July 6, 1893, the Attorney General commenced this action in the name and on behalf of the State, under 1878 G. S. ch. 76. In the complaint these facts were stated and the prayer was, that the Bank be adjudged insolvent and that an injunction issue restraining it from exercising corporate rights and from collecting its assets or paying out or transferring any of its money or property and that a receiver be appointed to take charge of all the property of the corporation and collect and convert it into money and that the State have such other and further relief as to the Court might seem just. On that day an order was obtained from a Judge of the District Court directing the defendant to show cause if any there was, before the Court on July 15, 1893, why it and its officers should not be thus restrained pending the action and why a receiver should not be appointed at once to take charge of its property and effects. The complaint and a summons in the action and a copy of said order were served by the Sheriff on July 6, 1893, at one o'clock in the afternoon upon Alden J. Blethen, President, F. M. Morgan, Cashier, and L. A. Reed, one of the board of directors of the Bank.

On the same day at three o'clock in the afternoon the Bank made and filed an assignment of its property in trust for its creditors under Laws 1881, ch. 148, as amended, to John P. Rea, one of its directors and its attorney. Rea accepted the trust and next day made and filed his bond and took possession of the property of the Bank. At the hearing before the Court on July 15, 1893, these facts were shown and after argument the Court discharged the order to show cause and declined to issue an injunction or appoint a receiver. On July 27, 1893, a case containing the assignment and all the papers, proofs, files, orders and a narrative of the proceedings was settled, signed and filed and the plaintiff appealed to this Court.

*H. W. Childs*, Attorney General, and *George B. Edgerton*, his assistant, for appellant.

The insolvency law of 1881 was not intended to affect 1878 G. S. ch. 76, in any way. This statute was passed with reference to certain corporations created by statute and does not apply generally to an insolvent debtor as is the case with the insolvency law of 1881. By the restraining order issued in this case and served before the assignment was filed, the plaintiff obtained a prior right and the defendant Bank in making an assignment acted without authority of law and in contempt of Court.

A director is not a proper person to be assignee and have charge of the estate, for the present condition of the Bank is in part due to his neglect of duty as a director for which the law holds him accountable under the circumstances in this case. *Atkins v. Washash, St. L. & P. R. Co.*, 29 Fed. R. 161; *Attorney General v. President & Co. of Bank of Columbia*, 1 Paige, 510; *Freeholders of Middlesex v. State Bank*, 28 N. J. Eq. 166; *Wiswell v. Starr*, 48 Me. 401; *Baker v. Backus*, 32 Md. 79; *Beach on Receivers*, § 33.

*Kitchel, Cohen & Shaw*, for respondent.

The proceedings under 1878 G. S. ch. 76, did not prevent a valid assignment under the Insolvency Law of 1881 as amended. The record fails to show a service of the restraining order, prior to the making of the assignment, upon more than two of the directors of the Bank. There is no evidence anywhere in the record that knowledge of the restraining order came to any of the directors who took part in the making of the assignment. Notice to an individual director who has no duty to perform in relation to the subject matter of such notice is not a good constructive notice to the corporation. *Fulton Bank v. New York & Sharon Canal Co.*, 4 Paige, 126; *Bank of Pittsburg v. Whitehead*, 10 Watts, 397; *Custer v. Tompkins Co. Bank*, 9 Pa. St. 27; *Farrel Foundry v. Dart*, 26 Conn. 376; *General Ins. Co. v. United States Ins. Co.* 10 Md. 517.

The assignment for the benefit of creditors was a proceeding in the same direction as the creation of a receivership under 1878 G. S. ch. 76, and accomplished the same purpose. The insolvency act of 1881 is applicable to private corporations. *'Tripp v. North-*

*western National Bank*, 41 Minn. 400. Under that act the pendency of an application for a receivership does not prevent the making of a valid assignment for the benefit of creditors. *Hyde v. Weitzner*, 45 Minn. 35; *St. Louis Car Co. v. Stillwater St. Ry. Co.*, 53 Minn. 129.

There was no abuse of the discretion of the lower Court in refusing to appoint a receiver. All the authorities are agreed that the appointment of a receiver rests in the sound discretion of the Court. *Hyde v. Weitzner*, 45 Minn. 35; *Covert v. Rogers*, 38 Mich. 363.

The plaintiff's proper remedy is an application to remove the assignee.

GILFILLAN, C. J. This is an action under 1878 G. S. ch. 76, by the attorney general on behalf of the state as a creditor against the defendant, an insolvent banking corporation. On the complaint and an affidavit, which made a case for the appointment of a receiver and for an injunction, an order was granted requiring the defendant to show cause why a receiver should not be appointed, and an injunction issued. At the time specified in the order the defendant did not attempt to show cause otherwise than by showing that after the commencement of the action it had made an assignment under the insolvency law of 1881 of all its property for the benefit of its creditors. On this showing the court refused to appoint a receiver or issue an injunction. The state appeals from the order so refusing.

Chapter 76 provides but a mere skeleton of procedure for the action authorized by it. Its provisions are very meager. But it gives an action to the creditor of a corporation whenever it is in the condition, or is guilty of the acts or omission, specified in the chapter. The action is given for a remedy which the creditor is entitled to as a matter of right, and which does not rest in the discretion of the court. It is the duty of the court to make the action effectual, and to exercise for that purpose the powers vested in it. Thus the court must appoint a receiver when it has been determined that a case exists under the chapter for the conversion and distribution among creditors of the property of the corporation, for it is only by means of a receiver that the property can

be collected and preserved, and its conversion and distribution effected. To say that in such case the court may, in its discretion, appoint or refuse to appoint a receiver, is to say that it may, in its discretion, grant or refuse the remedy given by the statute. Before a formal determination of an issue upon any of the plaintiff's allegations of fact essential to sustain the action or of facts alleged by defendant constituting a defense, it is in the sound discretion of the court to appoint or refuse to appoint a receiver. The appointment in such case is in the nature of a provisional remedy—a measure of precaution—to preserve the property to abide the determination of the issues on which plaintiff's right to have the defendant's property converted and distributed depends. But when on an application for such a receiver it appears that the court must finally convert and distribute the property,—in other words, when it is admitted that the facts which, under the statute, give the right to the action, exist, and there is no defense,—it would be an abuse of discretion to refuse to appoint a receiver to take charge of and preserve the property until the court shall order it converted, and the proceeds distributed.

What we have said of the appointment of a receiver applies equally to the issuing of an injunction.

We are satisfied, however, that the court did not refuse to appoint a receiver and to issue an injunction as a matter of discretion, but on the ground that the assignment by the defendant furnished a legal reason for refusing, and under the opinion that the case comes within the decision of *Hyde v. Weitzner*, 45 Minn. 35, (47 N. W. Rep. 311.) The cases, however, are not analogous. In that case the same end had been accomplished by the assignment which the petitioning creditors sought to have accomplished by the appointment of a receiver, to wit, the institution of an insolvency proceeding under the act of 1881. The only change which the appointment of a receiver would have effected would have been in the official name of the officer of the court, by designating him "receiver" instead of "assignee." And this court held that, although the assignment was made pending the application for a receiver, the court might allow it to stand instead of appointing a receiver. But in this case the two proceedings, while resembling each other in some particulars, are yet entirely different.

We need mention but two particular features of chapter 76 affecting the rights of the creditors: First, in an action under that chapter no releases are required as a condition of sharing in the distribution of the proceeds of the defendant's property; second, in such an action the creditors may have the directors or stockholders brought in to answer to any liability which the law imposes on them in favor of creditors of the corporation. The chapter gives a much larger remedy to the creditor than he can have under the insolvency law. It must be evident that the two proceedings—the action under chapter 76 and the insolvency proceeding under the act of 1881—cannot go on effectually together against the same corporation. If the two are commenced, one must stand and the other give way. Now, without determining whether by being commenced first the insolvency proceeding gets a preference so that the remedy of any creditor shall be confined to such as the insolvent law affords, we do not hesitate to hold that when a creditor has commenced his action under chapter 76 no subsequent act on the part of the corporation, or of any other creditor of the corporation, by making an assignment, or procuring the appointment of a receiver under the insolvent law, or otherwise, can defeat or impair his remedy by such action.

Order reversed.

(Opinion published 56 N. W. Rep. 575.)

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**T. A. DENNIS *vs.* JOHN J. NELSON *et al.***

Submitted on briefs Oct. 18, 1898. Affirmed Oct. 27, 1898.

No. 8319

**Bond for a stay of proceedings.**

On an application by defendant for a stay of proceedings after verdict against him, the court may require him, as a condition of the stay, to renew the security for final judgment.

**Such bond if made is valid.**

Where, for such purpose, the court require an undertaking, it is, when executed, voluntary, and good as a common-law undertaking.

**Pleading conclusions of law.**

An answer setting forth only conclusions of law may be treated as sham and irrelevant, and may be struck out on motion.

Appeal by defendants, John J. Nelson, D. S. Sivright, William E. Harrington, H. H. Pennoyer, D. H. Duckering and C. A. Pennoyer from an order of the District Court of McLeod County, *Francis Cadwell, J.*, made February 15, 1893, striking out their answer as frivolous and ordering judgment for plaintiff.

On April 16, 1889, one Eben Dennis made a contract with Samuel Spencer to sell and deliver to Spencer five hundred yearling steers at \$8.25 per head and received that day \$500 on the contract. Eben Dennis soon after assigned the contract to his father the plaintiff T. A. Dennis and he performed it by delivering the cattle, but Spencer did not pay for them. Plaintiff brought an action to recover \$4,070.50, the balance due with interest and attached the cattle. Spencer gave bond as provided in 1878 G. S. ch. 66, § 157, and the attachment was discharged. In his complaint T. A. Dennis alleged that he made the contract with Spencer. At the trial the facts were shown and Spencer seasonably objected that plaintiff could not recover upon a contract not made by him but by his son and assigned to him. The objection was overruled and plaintiff had a verdict. Afterwards on December 17, 1889, Spencer applied to the Court for a stay of proceedings for forty five days to enable him to make, settle and file a case and move for a new trial. The Court, *Hon. John H. Brown* then a Judge thereof presiding, granted the stay on condition that Spencer give an undertaking to plaintiff with sufficient sureties to pay any judgment finally obtained in that action against him. The Court further ordered that on filing such undertaking the prior bond given to discharge the attachment should be satisfied and discharged. The undertaking was given December 21, 1889, and the defendants above named were the sureties therein. The case was made, settled and filed and the motion made, but the Court refused a new trial. On appeal, this Court reversed the order and granted a new trial. *Dennis v. Spencer*, 45 Minn. 250.

The District Court then allowed plaintiff on motion to amend his complaint so as to state that the contract was made with his

v.55m.—10

son and assigned to him. Spencer answered the amended complaint admitting the contract, but denying the assignment and claiming the cattle were furnished and delivered by the son. John J. Nelson filed a complaint in intervention in the action, in which he alleged that he was a judgment creditor of Eben Dennis, that the contract was fraudulently assigned to his father by Eben to hinder, delay and defraud his creditors; that the unpaid purchase money belonged to Eben and that he (Nelson) had begun garnishment proceedings against Spencer, by which he had attached the money due Eben under the contract. The Court, *Hon. Gorham Powers* presiding, struck out the intervenor's complaint and on November 11, 1891, plaintiff again had a verdict for \$4,773.30, the amount of his claim and interest. Spencer and Nelson each moved for a new trial of that action, but were denied and they appealed, but the denial was affirmed in this Court. *Dennis v. Spencer*, 51 Minn. 259.

On December 1, 1892, judgment was entered in the District Court upon this verdict in favor of the plaintiff and against Spencer for \$5,277.05 damages, interest and costs. A writ of execution was issued thereon and returned unsatisfied. Thereupon, plaintiff brought this action upon the undertaking given December 21, 1889, against the makers thereof and demanded judgment for the \$5,277.05 with interest and costs. The defendants answered alleging that Judge *John H. Brown*, at the request of plaintiff, unlawfully and without right or authority required Spencer to give the undertaking before he would stay proceedings in that action or allow him to prepare a case or make a motion for a new trial thereof, that Spencer gave the undertaking under protest and against his will, solely to protect his right of appeal to this court. They further alleged that by the subsequent amendment of the complaint in that action the cause of action was changed and a new one substituted not in the minds of the sureties when they executed the undertaking. The answer stated that the amended complaint set forth an entirely different and distinct cause of action from that stated in the original complaint.

The plaintiff moved to strike out this answer as frivolous and for judgment. The Court, *Hon. Francis Cadwell* presiding, granted the motion. From that order defendants appeal.

*James Schoonmaker, for appellants.*

A frivolous answer is one which if true contains no defense to any part of the plaintiff's cause of action, and its insufficiency as a defense must be so glaring that the Court can determine it upon a bare inspection without argument. *Hatch v. Schusler*, 46 Minn. 207; *Morton v. Jackson*, 2 Minn. 219; *Perry v. Reynolds*, 40 Minn. 499.

While the right of appeal is not such a vested right that the Legislature cannot take it away; still, as long as the statute giving the right remains, no Court has the power to abridge that right by imposing terms as a condition precedent to the discharge of its statutory duty of settling and allowing a case or bill of exceptions and hearing and determining a duly presented motion for a new trial thereon. This undertaking is not statutory and it cannot be considered voluntary. It is, therefore, absolutely void. *Thompson v. Buckhannon*, 2 J. J. Marsh. 416; *Ancion v. Guillot*, 10 La. An. 124; *Baker v. Morrison*, 4 La. An. 372.

As against sureties the judgment mentioned in the undertaking can refer to no other judgment than the judgment to be thereafter entered upon the cause of action set forth in the pleadings as they then existed. Upon the issues as they then stood, no judgment could have been obtained against Spencer. It was only by amending the complaint, setting forth a different cause of action, that any judgment was obtained. *Sharp v. Bedell*, 10 Ill. 88; *Andrew v. Fitzhugh*, 18 Mich. 93; *Bean v. Parker*, 17 Mass. 591; *Langley v. Adams*, 40 Me. 125; *Quillen v. Arnold*, 12 Nev. 234.

*McClelland & Tift and E. P. Peterson, for respondent, cited* *Jaynes v. Platt*, 47 Ohio, 262; *Methodist Churches v. Barker*, 18 N. Y. 463; *Shepard v. Pebbles*, 38 Wis. 373; *Tapley v. Goodsell*, 122 Mass. 176; *Bruns v. Schreiber*, 48 Minn. 371; *Kellogg v. Kimball*, 142 Mass. 124; *Doran v. Cohen*, 147 Mass. 342.

GILFILLAN, C. J. Appeal from an order striking out an answer as frivolous. The facts alleged in the complaint and admitted in the answer are, briefly, that the plaintiff commenced an action in the District Court against one Spencer to recover the price of cattle



sold, and duly procured to be issued and levied on personal property of Spencer a writ of attachment. That defendant procured a discharge of the attachment by executing with sureties a bond such as the statute requires for such a purpose. The cause was then tried, a verdict rendered for plaintiff, and the defendant applied to the court for a stay of proceedings to propose and settle a case or bill of exceptions and move for a new trial, and the court refused to grant the stay unless defendant should cause to be executed and filed the undertaking on which this action is brought, which undertaking is that the defendant in that action should pay the judgment if one should be finally rendered against defendant, and it recites that it is executed pursuant to the order of the court, and to secure the judgment and release and discharge the sureties in the bond previously given to discharge the attachment. Judgment was finally rendered in favor of plaintiff and against defendant, execution duly issued thereon, and returned unsatisfied. The answer contains allegations of new matter in connection with the requirement of the District Court that the defendant in that action should furnish an undertaking that amount to nothing more than an attempt to impugn the motives of the court in requiring the undertaking to be filed as a condition of the stay of proceedings. But no rule of law is more unquestionable, more elementary, than that a court's integrity of motive cannot be questioned except by the state, in proper proceedings. No argument would be permitted upon an attempt by a party in an action to impair a decision or order of a court by impeaching its motives. Except in a proceeding to review the decision or order, no question is open but that of the power or jurisdiction of the court to make the decision or order. That upon an application for a stay of proceedings after verdict the court may, in its discretion, require renewal of security for the final judgment as a condition of granting the stay, cannot be doubted. The statute (1878 G. S. ch. 66, § 240) provides: "The judge trying the cause may, in his discretion, and upon such terms as may be just, stay the entry of judgment and further proceedings until the hearing and final determination of a motion for a new trial," etc. The statute gives the defeated party the absolute right, which he may exercise without leave of the court or a stay of proceedings, to propose and have settled within a specified time a

case or bill of exceptions, to move for a new trial, and to appeal within a specified time. His application for a stay is voluntary. If the order on such application requires as a condition of a stay that the party do anything, his doing it is voluntary. He may do it, and accept the stay, or refuse to do it, and reject the stay. The undertaking, being voluntary and lawful, is good as a common-law undertaking, without regard to any authority of the court to require it.

The answer further alleges that, the verdict above mentioned having been set aside, the plaintiff, by leave of court, served an amended complaint, "which amended complaint set forth an entirely different and distinct cause of action from that set forth in the original complaint in said action," and that upon the verdict on a trial of that cause of action the final judgment was rendered. Now, whether the facts alleged in the amended complaint constituted a cause of action different from that shown by the facts stated in the original complaint was not a fact, but a conclusion of law, to be drawn from a comparison of the facts stated in the two pleadings. The party pleading could not be permitted to determine that question, and plead accordingly, but it was for him to plead the facts, from which the court might determine it, and his pleading amounts to nothing unless he did so. Where the pleading violates this rule it is to be regarded as irrelevant, and interposed for delay only, and may be stricken out on motion. The insufficiency of this answer is so apparent as to need no argument, and it ought to be subject to the summary method of a motion to dispose of it.

**Order affirmed.**

(Opinion published 56 N. W. Rep. 539.)

CHARLES CLIFFORD *vs.* NORTHERN PACIFIC RAILROAD CO.

Submitted on briefs Oct. 16, 1893. Reversed Oct. 27, 1893.

No. 8516.

**Costs in actions for labor or services.**

The costs allowed upon the recovery of the price or value of labor or services by Laws 1891, ch. 41, may be recovered by an assignee of the person rendering the labor or services.

Appeal by plaintiff, Charles Clifford, from a judgment of the Municipal Court of the City of St. Paul, entered November 28, 1892.

During the month of June, 1892, O'Malley, a switchman, worked for the defendant, the Northern Pacific Railroad Company at its request seven days at \$2.50 per day. He assigned his claim for wages to plaintiff who demanded of the company \$17.50. After the expiration of thirty days he brought suit before Eric Olson, a Justice of the Peace of St. Paul to recover the amount. The defendant answered denying a part of the indebtedness. At the trial on September 26, 1892, plaintiff had judgment for the amount of his claim and his disbursements. But the Justice refused to include in the judgment \$5 statutory costs given by Laws 1891, ch. 41, upon a recovery in Justice's Court for labor or services. Plaintiff appealed to the Municipal Court on questions of law alone. There the judgment of the Justice was, after argument affirmed and the plaintiff's claim for \$5 costs disallowed. Defendant had judgment for its costs in that Court. Plaintiff appealed to this Court and under Rule XV. the parties submitted on their printed briefs.

*R. A. Walsh*, for appellant.

*T. R. Selmes and Lawler, Durment & Bigelow*, for respondent.

GILFILLAN, C. J. In this case is raised the question whether the costs upon recovery by action of the price or value of labor or services allowed to the plaintiff are to be allowed him when he sues for and recovers such price or value as the assignee of the person who rendered the labor or services.

There is nothing in the terms of the statute (Laws 1891, ch. 41)

to indicate the contrary. It provides that, if "the same [the price or value] shall be recovered by action," (without limitation to a recovery by the person rendering the labor or services,) "there shall be allowed and taxed for the plaintiff," etc., who may be the original owner of the claim, or his personal representative or assignee. It is a general rule that an assignment of an assignable cause of action takes with it all the remedies of the assignor. The legislature must, in passing this statute, have had in mind that the claim for labor or services might be assigned, and that the assignee might recover; but there is in the statute a suggestion, at least, of careful avoidance of such words or form of expression as would indicate an intent to make the right to the costs, given by it, personal to the one rendering the labor or services. The words used attach the right to the cause of action, and not to the person.

**Judgment reversed.**

(Opinion published 56 N. W. Rep. 590.)

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**DAVID A. DUNCAN *et al.* vs. NELLIE M. EVERITT *et al.*, (two cases.)**

55	151
88	184

Argued Oct. 19, 1893. Affirmed Oct. 27, 1893.

Nos. 8496, and 8497.

**Bill of Exceptions or Case required to review these appeals.**

Where the appellant omits to make a bill of exceptions, or a statement of the case, prepared and settled as required by law, the order or judgment appealed from should be affirmed.

Appeal by defendants, John C. Perry and others, from a judgment of the District Court of St. Louis County, *Chas. M. Start, J.*, rendered January 9, 1893, that they take nothing in this action.

Appeal by Archibald J. Boyd from an order of the District Court of St. Louis County, *C. L. Brown, J.*, made February 25, 1893, denying his motion to open the judgment in this action and make him a party defendant therein and allow him to answer and have a retrial.

The plaintiffs, David A. Duncan, Charles A. Duncan and Frank A. Brewer were partners in business at Duluth and between July 11 and November 22, 1890, sold and delivered lumber to C. A. Everitt & Co. to the value of \$845.52 to be used and which was used in building a house on lots fifteen (15) and sixteen (16) in block one hundred and forty five (145) in West Duluth, belonging to defendant, Nellie M. Everitt. The West Duluth Land Company owned the lots, but had given her a contract to convey them to her on payment of the balance of the purchase price. Plaintiffs filed a lien on the lots for the price of the lumber and brought this action to foreclose it and obtain a sale of the property. The Land Company, John C. Perry and others, claiming liens on the lots, were made defendants with the Everitts. The different defendants answered setting up their several rights, interests or claims to liens and the issues were referred to Scott Rex to take the proofs in the case and report the facts. He heard the evidence and reported the facts established. He also appended his conclusions of law. Judgment was entered January 9, 1893, directing a sale of the property and payment of plaintiff's claim, and the balance due to the West Duluth Land Company, out of the proceeds, but adjudging that John C. Perry and some of the other claimants had no lien on the property. No case or bill of exceptions was made or filed. Perry and the other unsuccessful defendants appealed from the judgment, but the evidence of their claims is not in the record.

After this judgment had been entered, Archibald J. Boyd and several others moved the Court upon notice and affidavits to open the judgment and to be made parties defendant and allowed to answer and have a trial of the issues thus made and to share in the proceeds of the sale. This motion was denied February 25, 1893, and Boyd alone appeals from that order. No case was prepared or statement made, signed by the trial Judge, showing what evidence, affidavits or proofs were produced on the hearing of this motion. The two appeals were heard in this Court at the same time and both disposed of in the following opinion.

*Hill & De Vore*, for all the appellants.

*H. F. Greene*, for respondents Duncan *et al.*

*McCordic & Crosby*, for respondent Duluth Land Co.

BOOK, J. The plaintiff commenced an action in the district court of St. Louis county against certain of the defendants, viz. Nellie M. Everitt individually and Charles A. Everitt and Lawrence F. Everitt, copartners as C. Everitt & Co., and the West Duluth Land Company, to foreclose a mechanic's lien upon certain lots in West Duluth. Only the land company answered.

By stipulation of the parties pleading, one Scott Rex was appointed by the court to take proofs of such facts as were necessary to enable the court to give judgment in the premises, and to report the same to the court. Such facts were so taken by the referee and reported to the court, but the referee also reported his conclusions of law. The court found the facts to be as reported by the referee, and found its own conclusions of law, and ordered judgment for plaintiffs, and directed that the premises be sold, and the proceeds applied to the payment of the costs of suit, and the amount found due plaintiffs, and also decreed the same to be a lien upon the premises.

The judgment was rendered August 18, 1891. Up to this time the other defendants mentioned in this appeal had not been made parties to the action, and it did not concern them as to whether the referee erred in reporting to the court his conclusions of law. On the 3d day of October, 1891, these other defendants applied to be made parties in the action for the purpose also of having certain claims adjudged mechanics' liens upon the same premises, and that upon a sale of said premises they be allowed to share in the proceeds of sale. For this purpose lengthy proceedings were had in the matter, which we deem unnecessary to state in detail. Their application was denied by the court below upon the ground that the alleged errors in the judgment complained of could only be reached and corrected, if they existed, by a motion for a new trial, based upon a settled case containing the evidence. Neither in that court nor in this is there any bill of exceptions or a statement of the case prepared and settled as required by law. The appeal from the order is not one denying a motion for a new trial, but an appeal from a certain order of the court below denying the motion of the intervening creditors to set aside and vacate the judgment rendered against them subsequent to the original judgment. What the errors or grounds for appeal are in the order or judgment ap-

pealed from nowhere appears, for there is no bill of exceptions or settled case to enable this court to determine whether there was error in the court below or not.

The order and judgment appealed from are therefore affirmed.

(Opinion published 56 N. W. Rep. 591.)

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ROBERT L. WILKINS *vs.* WILLIAM C. SHERWOOD.

Submitted on briefs by appellant, argued by respondent, Oct. 24, 1893. Affirmed  
Oct. 27, 1893.

No. 8289.

**Action to set aside a judgment obtained by perjury.**

The decision of this court in *Huss v. Billings*, 42 Minn. 63, followed.

Appeal by plaintiff, R. L. Wilkins, from an order of the District Court of St. Louis County, *Josiah D. Ensign, J.*, made February 16, 1893, sustaining a demurrer to his complaint.

The complaint stated that the defendant, William C. Sherwood, on June 3, 1891, obtained judgment in the District Court of St. Louis County against Wilkins for \$7,684.78 damages for breach of the covenants in a deed he made December 15, 1888, to Carroll M. Mauseau of Lot thirty eight (38) on West First Street in Duluth Proper, First Division. That he, Wilkins, answered in that action and on the trial of the issues Sherwood was a witness in his own behalf and falsely testified that he paid Wilkins divers sums of money to apply upon the purchase price of the lot, which were never in fact paid, and also falsely testified that Wilkins gave him receipts for the payments, which receipts he produced, but they were false and were forged by Sherwood. That he, Wilkins, was surprised and unable seasonably to procure the evidence which he now has to disprove such payments and counteract the fraud, forgery and perjury by which the amount of that judgment was greatly increased. The prayer of the present complainant is that the judgment be set aside and that he, Wilkins, have such other relief as to the Court should seem meet. The facts in the former

action appear in *Sherwood v. Wilkins*, 50 Minn. 152. The defendant demurred to this complaint. The demurrer was sustained and plaintiff appeals.

*W. Hammons*, for appellant.

*W. B. Phelps, F. N. Crosby and S. T. & Wm. Harrison*, for respondent.

Buck, J. We think the decision of this court in the action of *Haas v. Billings*, 42 Minn. 63, (43 N. W. Rep. 797,) controls the questions raised by the demurrer in this case, and the doctrine there stated should be considered as the settled law in regard to that class of cases. The complaint in this action does not fully set out the material facts necessary in a complaint in an action brought under 1878 G. S. ch. 66, § 285, but we place our decision upon the rules of law as laid down in *Hass v. Billings*.

The order of the court below sustaining the defendant's demurrer to the plaintiff's complaint is affirmed.

(Opinion published 56 N. W. Rep. 591.)

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ST. CLOUD COMMON COUNCIL vs. MARY KARELS *et al.*

Submitted on briefs Oct. 13, 1898. Appeal dismissed Oct. 27, 1898.

No. 8316.

**No appeal lies from an order denying a reargument.**

An order denying a motion for a new trial, made by the district court upon an appeal from the judgment of a justice's court upon questions of law alone, is not an appealable order, under 1878 G. S. ch. 86, § 8.

Appeal by defendant, Mary Karels, from an order of the District Court of Stearns County, *D. B. Searle, J.*, made March 1, 1893.

By Sp. Laws 1877, ch. 234, paupers were made a town charge in the County of Stearns and it was therein provided that every poor person unable to earn a livelihood and residing in that County should be supported by his or her father, mother or other nearest relative, if of sufficient ability. If such parent or relative failed so



to do, he or she should forfeit fifteen dollars per month, during such failure, for the use of the poor, to be recovered in the name of the town supervisors, if such poor person lived in a town, or in the name of the city council, if living in St. Cloud. Under this statute the Common Council of the City of St. Cloud brought this action August 6, 1892, in a Justice's Court against Peter Karels and Mary Karels his wife to recover of them fifteen dollars for failing to support during the month of July, 1892, their daughter, Anna Vaughn, a poor person unable, in consequence of bodily infirmity, to earn her livelihood. The defendants answered that Mrs. Vaughn's bodily infirmity was caused by the negligence of the plaintiff in failing to keep in repair its sidewalk on St. Germain Street, and that an action by Mrs. Vaughn against the City for damages was then pending in the District Court. Peter Karels had no property and was discharged, but judgment was rendered by the Justice August 26, 1892, against Mary Karels for \$15 damages and \$49.57 costs. She appealed to the District Court on questions of law alone. The judgment was there affirmed and judgment entered on February 4, 1893. She moved for a new trial, but was denied by an order made March 1, 1893. She then appealed to this Court. The City Council moved to dismiss the appeal on the ground that the order appealed from, though termed an order denying a new trial, is not such an order in fact, but only an order refusing to set aside the decision of a question of law and grant a reargument of a legal question it had already decided. That the appeal should have been from the judgment.

*M. D. Taylor*, for the respondent, cited *Ashton v. Thompson*, 28 Minn. 330; *Marvin v. Dutcher*, 26 Minn. 391; *Brown v. Minnesota Thresher Mfg. Co.*, 44 Minn. 322; *Lockwood v. Bock*, 46 Minn. 73.

*Oscar Taylor*, for appellant, opposing, cited 1878 G. S. ch. 86, § 8, subd. 4.

**BUCK, J.** The motion of the respondent to dismiss the appeal in this action must be sustained. The action was commenced before a justice of the peace. Issue was joined, and plaintiff recovered judgment against Mary Karels for \$15 and costs. She appealed to the district court upon questions of law alone. There the judg-

ment of the justice's court was affirmed. She then moved for a new trial in the district court, where the motion was denied, and she appeals to this court from the order denying a new trial. Such an order is not appealable. *Dodge v. Bell*, 37 Minn. 382, (34 N. W. Rep. 739.)

Appeal dismissed.

(Opinion published 56 N. W. Rep. 592.)

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JAMES F. FOSTER vs. JOSEPH HANSMAN.

Submitted on briefs Oct. 17, 1893. Affirmed Oct. 27, 1893.

No. 8418.

Costs on appeal from the judgment of a Justice of the Peace.

The defendant who appeals from the judgment of a Justice of the Peace to the District Court, and who, although he does not reduce the recovery against him one-half, succeeds upon the only matter litigated in the action and appeal, is entitled to costs.

Appeal by plaintiff, James F. Foster, from a judgment of the District Court of Clay County, *Frank Ives, J.*, rendered February 18, 1893, for \$65.21 damages, less \$22.86 costs, taxed and allowed the defendant, Joseph Hansman.

Plaintiff brought this action in a Justice's Court to recover \$90 and interest due him from defendant upon a promissory note. The defendant by his answer admitted this debt. For counterclaim he alleged that plaintiff owed him \$6.05 for sand, plaster and cement and \$30 for making plans for plaintiff for an addition to his house and he tendered the balance. The plaintiff in his reply admitted the counterclaim of \$6.05 and denied the other for \$30. This issue was tried before the Justice who gave judgment November 21, 1892, for plaintiff for \$95.41 damages, and \$5.70 costs. The defendant appealed to the District Court on questions of both law and fact. On the trial in that Court January 5, 1893, the jury allowed the defendant the \$30 and returned a verdict for plaintiff and assessed his damages at \$65.21. The Clerk taxed defendant's costs at \$22.86 and deducted them from the amount of the verdict

and entered judgment for plaintiff for \$42.35. The plaintiff duly objected to the allowance of costs to the defendant and appealed from the taxation of the Clerk, but the Court affirmed the taxation. Plaintiff thereupon appealed from the judgment to this Court and assigned as error the allowance of costs to defendant.

*C. A. Nye*, for appellant, cited *Flaherty v. Rafferty*, 51 Minn. 341, and *Watson v. Ward*, 27 Minn. 29.

*A. Ross*, for respondent.

GILFILLAN, C. J. The action was on a promissory note before a Justice of the Peace. The answer admitted plaintiff's claim, and set forth a counterclaim consisting of six items, and amounting in the aggregate to \$36.05. The reply admitted five of the items, and denied one for \$30. That item was therefore the only thing in controversy in the action. The Justice decided upon that item in favor of plaintiff, and gave him judgment for \$95.41 and costs. On an appeal by defendant to the District Court on questions of law and fact, the jury rendered a verdict in favor of plaintiff for \$65.21, thus deciding upon the item of \$30 in favor of defendant. He was, therefore, the successful party upon the only matter litigated in the action and on the appeal, as is shown by the pleadings, which, under the last clause of 1878 G. S. ch. 67, § 14, entitled him to costs.

Judgment affirmed.

(Opinion published 56 N. W. Rep. 592.)

**AULTMAN, MILLER & Co. vs. MICHAEL CLIFFORD.**

Submitted on brief by respondent, argued by appellant, Oct. 16, 1898. Reversed  
Oct. 27, 1898.

55	159
82	250

No. 8399.

**Parol evidence to vary an incomplete written instrument.**

Where a written instrument or order is incomplete, and not purporting on its face to express the whole of the mutual agreement of the parties, parol evidence is admissible to show the oral agreement of the party to whom it is given, which constituted a condition on which the maker of the order gave it, and on which performance on his part was to depend, as that the article ordered should be of a certain quality.

**Performance of an executory contract of sale.**

Where a written order contained the words, "note for one hundred and ten dollars; three fall payments, at eight per cent.," the time of payment is uncertain and ambiguous, and the order incomplete on its face. A delivery of property so as to pass the title to it, and make the transaction an executed contract, should be a delivery of the property corresponding with the order or contract, which is a condition precedent to the vesting of the title in the vendee.

Appeal by defendant, Michael Clifford, from an order of the District Court of Traverse County, *C. L. Brown, J.*, made July 30, 1892, granting plaintiff's motion for a new trial after verdict for defendant. The plaintiff is a corporation.

*A. S. Crossfield*, for appellant.

*E. T. Young*, for respondent.

**Buck, J.** The plaintiff brought suit against the defendant in the district court for the sum of \$110, upon the instrument, of which the following is a copy viz.:

"July 13th, 1891. 'I have this day ordered of Aultman, Miller & Co. one seven-foot Buckeye binder, for which I agree to pay one hundred and forty dollars,—note for one hundred and ten dollars, and his old McCormick binder; three fall payments, at eight per cent. The binder to be delivered on or before July 25th, 1891.'"

Before the last-named date the parties substituted a six-foot binder, with bundle carrier, in the place of the seven-foot binder mentioned in the original order, but upon the same terms. The

defendant refused to execute the notes, for the reason that the binder was not such as plaintiff represented and warranted it to be. In the month of December following, this action was commenced for the full amount of the three notes mentioned in the order. The defendant answered, and alleged that at the time of ordering said machine, and as part of the terms of the contract of said purchase, plaintiff orally represented that it would furnish a binder to be of good material, well made, light draft, and as good as any other machine manufactured for the purpose of cutting and binding grain, and that the binder so to be furnished would in fact cut and bind grain as well as any other machine manufactured for such purpose; and that defendant, relying upon such representations, was thereby induced to give such order.

Upon the trial the evidence fully sustained the contention of the defendant, and the jury so found.

Before submitting the case to the jury, the plaintiff asked the court to instruct the jury to find a verdict for plaintiff, for the reason that the contract of sale in this case was in writing, and contained no warranty, and that, therefore, no oral warranty could be shown to vary the terms of the written contract. The court denied this motion, and the plaintiff excepted. Afterwards the plaintiff moved for a new trial, upon the minutes of the court, and it granted a new trial, holding that this case is controlled by the decisions of this court in the case of *Thompson v. Libby*, 34 Minn. 374, (26 N. W. Rep. 1,) and *Kessler v. Smith*, 42 Minn. 494, (44 N. W. Rep. 794.)

Nothing in this opinion is to be construed as in any manner trenching upon the rule or doctrine laid down in those cases.

This was an executory instrument. The plaintiff had twelve days in which to furnish the binder, and the notes were to be executed in the future. It does not appear that the binder was in existence at the time the order was given. The defendant had no opportunity to inspect it or test its fitness or capability for doing the work for which he had ordered it. Now, a party receiving an order for a binder for doing a certain kind of work does not fulfill the conditions of the order by furnishing a binder of a different kind, and which will not do the work of the binder ordered.

This is not the case of a binder being present at the time the order

was given, and the seller then warranting the binder to do good work, but a case of an executory instrument, incomplete on its face, and not purporting to give the whole of the mutual executory engagements of the parties.

The term "three fall payments, at eight per cent.," of \$110, is uncertain and ambiguous. The term "fall," when applied to the seasons of the year, is defined by Webster to mean "the season when the leaves fall from the trees." If the word "fall," as used in this order, means during the months of September, October, and November, then its ambiguity is apparent, for in such case it would be payable in some of those months; but whether September 1st, or the middle of October, or the last day of November, there is no legal way of determining. The plaintiff might claim that the payments would each be due the 1st day of September of each year, and the defendant with equally as much confidence claim that they would not be due until the last days of November of each year, and this ambiguity lead the parties into that very litigation which the law seeks to avoid, by requiring contracts to be definite and certain, or, in other words, complete contracts in themselves. If there was no time mentioned at all, then it would be understood by the parties to be a cash payment, or that delivery and payment were to be concurrent acts. In the case of *O'Donnell v. Leeman*, 43 Me. 158, an instrument of sale provided that the consideration should be one-third cash down, but it was silent as to when the rest should be paid, and it was held to be an incomplete instrument, and that no action could be maintained upon it at law or in equity. In this case there was not that legal delivery or acceptance of the property which passed the title to the defendant. There was an actual physical delivery of the binder to the defendant, and a temporary use of it by him, but he did not receive any substantial benefit from its use, and returned it to the premises of the plaintiff, where it was left, although plaintiff refused to accept it. A delivery of property, so as to pass the title to it and make the transaction an executed contract, should be a delivery of the property corresponding with the order or contract, which is a condition precedent to the vesting of the title in the vendee. 10 Amer. & Eng. Enc. Law, 104, 105. The written instrument or order being incomplete, and not p. 1r. v. 55m.—11

porting on its face to express the whole of the mutual agreement of the parties, parol evidence was admissible to show an oral agreement on the part of plaintiff, which constituted a condition on which defendant gave the written order, and on which performance on his part was to depend, as that the binder should be of a certain quality. The jury must have found that the plaintiff did not in this respect comply with its parol warranty and representations, and, if not, then there was not such legal delivery and acceptance of the binder by defendant as bound him to retain or pay for it.

The oral evidence respecting the parol warranty was properly admitted, and the court below erred in granting a new trial. For this error the order granting such new trial is reversed.

(Opinion published 56 N. W. Rep. 593.)

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WALLACE W. WETMORE *vs.* DAVID ROYAL *et al.*

Argued Oct. 17, 1893. Reversed Oct. 27, 1893.

No. 8300.

**Incorrect lien statement will not be reformed so as to prejudice a subsequent incumbrancer actually misled by the incorrect statement.**

Where a contractor made an itemized and verified statement of materials furnished and labor performed by him in the erection of a dwelling house, and filed the same in the office of the register of deeds, where the same was duly recorded March 14, 1891, in which statement he asserts an erroneous date of September 30, 1890, as the time when the first item of such material was so furnished and such labor performed, he is not entitled to have such erroneous statement corrected so as to show that such material was furnished and labor performed as of the 29th day of August, 1890, as against the rights of a mortgagee having a mortgage lien on said premises, dated and recorded September 3, 1890, and where said contractor allowed said erroneous statement to remain of record uncorrected from the date of its filing and recording until April 28, 1892, and where said mortgagee had in the mean time proceeded to foreclose his mortgage and bid off the premises for the full amount thereof on the 26th day of June, 1891, relying upon the correctness of the date of September 30, 1890, in said contractor's lien statement so filed and recorded.

**Burden of proof of actual notice and of no prejudice.**

The court below allowed the plaintiff on the trial, April 28, 1892, to amend his complaint, and thereby to correct said erroneous date of September 30, 1890, and to insert therein as the true date of furnishing the first item of material and performing such labor the 29th day of August, 1890, and by its decision made the mechanic's lien of said contractor superior and paramount to that of the mortgage lien of the mortgagee. *Held* that, as against this defendant, this was error, and that the burden of proof was upon the plaintiff to show that the rights of the mortgagee were not impaired by such amendment.

**Estoppel by acts without fraud.**

A party may be estopped by his acts or conduct which misled a party to his injury, although not guilty of any fraudulent design to mislead. If a party has performed any voluntary act calculated to mislead, and which act does in fact mislead, another party acting in good faith, equity will protect the party so misled.

Appeal by defendant, the Pioneer Savings and Loan Company, from an order of the District Court of Hennepin County, *Frederick Hooker, J.*, made February 23, 1893, denying its motion for a new trial.

The plaintiff, Wallace W. Wetmore, furnished materials and did work in constructing a house for defendant David Royal on the North forty eight (48) feet in width of lot five (5) of Cornell's Out Lots to Minneapolis. On August 29, 1890, the plaintiff commenced work and delivered the first material on the ground. On March 14, 1891, he made and filed a lien statement, in which by mistake he stated that he commenced work and delivered the first material on September 30, 1890. Meantime, the Loan Company, a corporation, loaned to Royal on September 3, 1890, \$6,000 and took a mortgage on the property. This mortgage was subsequently foreclosed under a power therein and at the sale on June 20, 1891, the property was bid in by the Loan Company for the full amount of its mortgage. This action was begun December 14, 1891, to foreclose the mechanic's lien. Royal and the Loan Company were made defendants, but the latter alone answered. On the trial April 28, 1892, plaintiff was allowed to amend his complaint and prove the mistake in the date in the lien statement, but he offered no evidence that the Loan Company actually knew of the work when it took its mortgage; or knew of the error in the lien statement or knew that



he was unpaid when it foreclosed and bid in the property. Findings were made and judgment ordered that plaintiff's lien was elder and superior to the mortgage. The Loan Company moved for a new trial, but was denied, the Judge saying he did not believe the Loan Company was misled by the mistake, and cited *Althen v. Tarbox*, 48 Minn. 18. The Loan Company appeals.

*George D. Emery*, for appellant.

The false date in the lien statement ought not to be amended as against this mortgagee, as it had no notice of the defect and relied upon the correctness of the lien statement and foreclosed its mortgage and bid in the property for its full value. The variance should have been held fatal and the lien statement rejected as not conforming to the amended complaint. *Rugg v. Hoover*, 28 Minn. 404; *Meyer v. Berlandi*, 39 Minn. 438; *Foster v. Schneider*, 50 Hun, 151; *Cannon v. Williams*, 14 Colo. 21; *Noll v. Swineford*, 6 Pa. St. 187. A defective statement cannot be amended. *Lindley v. Cross*, 31 Ind. 106; *Vreeland v. Boyle*, 37 N. J. Law, 346; *McDonald v. Rosengarten*, 134 Ill. 126; *Colman v. Goodnow*, 36 Minn. 9; *Hickey v. Collom*, 47 Minn. 565; *Beals v. Congregation B. J.*, 1 E. D. Smith, 654; *Ferguson v. Ashbell*, 53 Tex. 245.

The power of sale has been exercised in reliance on the record and it is too late to correct the error or restore this defendant to its former status.

*Paige & Paige*, for respondent.

The plaintiff's lien was not invalidated by the error in the lien statement. *Linne v. Stout*, 41 Minn. 483; *Johnson v. Stout*, 42 Minn. 514; *Treusch v. Shryrock*, 55 Md. 330; *Fourth Baptist Church v. Trout*, 28 Pa. St. 153.

So far as the mortgage itself is concerned it is clear that the Loan Company was not prejudiced or misled by the error. The lien was prior to the mortgage during all the time from August 29, 1890, until June 20, 1891, and only lost its priority, if it be lost, on that date, because the Loan Company then bid in the property at its own foreclosure sale for the full amount due on the mortgage.

The Loan Company could not have been misled to its prejudice

by the error in the lien statement, for even if the plaintiff was bound by that erroneous statement, not to claim his first item as of an earlier date than September 30, 1890, he would still have a lien relating back to the commencement of the building on August 29, 1890, paramount and superior to this defendant's mortgage made and filed September 3, 1890. *Gardner v. Leck*, 52 Minn. 522; *Hewson-Herzog Supply Co. v. Cook*, 52 Minn. 534; *Glass v. Freeberg*, 50 Minn. 386.

BUCK, J. On the 26th day of August, 1890, one of the defendants, David Royal, was the owner of a lot in the city of Minneapolis, and on that day he entered into a verbal contract with the plaintiff whereby he agreed, for the consideration of \$2,700, to furnish material and labor for the erection of a double frame tenement house upon said lot. He performed his part of the agreement, and furnished extra material and labor to the amount of \$40. On the 2d day of September, 1890, said verbal contract was reduced to writing, and signed by Wetmore and Royal. On the 29th day of August, 1890, Wetmore commenced work on this lot, and delivered some material on said premises, which was afterwards used in the erection and construction of said house; and between that day and the 16th day of December, 1890, inclusive, he furnished the necessary material and performed the necessary labor to complete said house. On the 11th day of October, 1890, he was paid on said contract \$1,000, and on the 9th day of December he was paid \$500 thereon. On the 14th day of March, 1891, Wetmore made out an itemized statement in writing of the amount and value of the materials furnished and labor done in the erection of said house, which he verified, and caused the same to be filed and recorded in the office of the register of deeds of Hennepin county, showing also the payments made, and claiming a lien upon the premises for the balance unpaid, of \$1,240. In the verified written statement so made by him is this clause: "The time when the first item of such material and labor was furnished is September 30, 1890. The time when the last item of such material and labor was furnished is December 16, 1890." On the 26th day of August, 1890, said defendant Royal applied to this other defendant, the Pioneer Savings & Loan Company, then an existing corporation, under the name of the National Building Loan

& Protective Union, for a loan of \$6,000. This loan was made, and, to secure the payment thereof, said Royal and wife executed a mortgage upon the lot in question, dated September 1, 1890, but which mortgage was not executed and delivered until September 3, 1890, and on said day duly recorded in the office of the register of deeds of said county of Hennepin. Part of said loan was used in paying off two prior mortgages on said lot, amounting to \$3,067.58, and taxes thereon to the amount of \$174.51. The \$1,500 paid Wetmore on said contract was also paid out of this loan by checks given him by this defendant loan company, and his uncontradicted testimony shows that all of said \$6,000 loan except \$600 was used in paying incumbrances on said lot, and for the erection of buildings thereon. The only unpaid indebtedness for the erection of said house is the sum of \$1,240, due the contractor Wetmore. There was default in the payment of the mortgage of \$6,000 executed by Royal and wife, and the mortgage was duly foreclosed, and the property bid in by the defendant Loan Company, June 26, 1891, for the sum of \$5,469.76, the amount due on said mortgage and costs of sale. No redemption has been made from such sale. On the 14th day of December, 1891, plaintiff commenced an action to foreclose his mechanic's lien, and substantially set forth his verified, itemized lien statement as originally filed, and in such complaint demanded that such lien for labor and material so furnished be adjudged preferred and paramount to the said mortgage lien of the defendant Loan Company upon said premises. The defendant Loan Company appeared and answered, and upon the trial in the District Court, on the 28th day of April, 1892, plaintiff was permitted to amend his complaint so as to show that the true date of his furnishing the first item of material and labor in the erection of said house was on the 29th day of August, 1890, and not on the 30th day of September, 1890, as alleged in said written, itemized, and recorded statement. This permission was granted by the court against this defendant's objection. After trial had, the court below rendered its decision that plaintiff recover of David Royal the sum of \$1,240, and interest from December 16, 1890, and costs, and the same was decreed to be a specific lien on all the right, title, and interest, claim, or demand of said Royal and his wife in and to said lot on, from, and since August 29, 1890, and superior to any estate, interest, lien, claim, or

demand of the defendant the Pioneer Savings & Loan Company. Said defendant thereupon moved to vacate said decision, and for a new trial, which motion was denied, and from the order denying the same an appeal was taken to this court.

We have deemed it advisable to make this somewhat lengthy statement of the facts in the case that we may the more readily apply the rules of law governing such an action. It is not necessary for us to determine whether the plaintiff's mechanic's lien or the defendant's mortgage lien was prior in point of time. The vital question is this, did the plaintiff, by inserting in his written, itemized, verified lien and recorded statement, on March 14, 1891, an allegation that the time when the first item of such material and labor was furnished was September 30, 1890, and letting such statement so remain of record, estop him from claiming priority as against this defendant's rights as they appear in this case. It was alleged in plaintiff's original complaint that the first date of furnishing such labor and material was September 30, 1890, and there was no claim that it was erroneous, or any attempt made to correct it until the trial. The original complaint also fully described this defendant's mortgage, including its date, and when and where recorded. The court below found that there was no fraudulent purpose on the part of the plaintiff in inserting in the lien statement the erroneous date of September 30, 1890. With the case thus presented to us, which party has the superior and paramount right? Suppose that the plaintiff, after the 16th day of December, 1890, had verbally stated to the defendant loan company that the first date of his furnishing material and labor in the construction of said house was September 30, 1890, and thereafter had repeatedly so stated for more than one year; would he not be estopped from denying it if such statement misled this defendant to his injury? Is he any the less responsible because he made a sworn statement to this effect, and placed it upon the public records in the office of the register of deeds of Hennepin county? What are public records for, unless to charge and bind people with the notice of their contents? If that record could protect plaintiff by its contents as against other parties, it could protect this defendant as against the statement therein made by plaintiff. If it was erroneous, it was not the fault of this defendant, but the carelessness and negligence of the plaintiff.

Now, who shall suffer,—the careless and negligent party or the innocent one, against whom not a word of fraud, unfairness, or negligence is charged? The equities of the contractor Wetmore are no greater than those of this defendant Loan Company. These premises were increased in value more than \$5,000 by defendant's loan to Royal. Prior incumbrances on this lot, amounting to more than \$3,000, were paid out of this loan. Fifteen hundred dollars of it was paid to plaintiff by defendant's checks for material and work furnished in erecting this dwelling house. Plaintiff himself so testified. It is not necessary that there should appear to have been any fraudulent act on the part of plaintiff in inserting the erroneous date of September 30, 1890, in his lien statement. A party may be estopped by his acts or conduct which mislead a party to his injury, although not guilty of any fraudulent design to mislead. If a party has performed any voluntary act calculated to mislead, and *which act does in fact mislead* another party acting in good faith, equity will protect the party so misled. *Trustees, etc. v. Smith*, 118 N. Y. 634, (23 N. E. Rep. 1002.) This defendant had no part in the making of the recorded lien statement. Neither by its negligence, carelessness, or wrongdoing did it contribute to the insertion of the erroneous date of September 30, 1890. Having faith in its apparent verity, and guided by its solemnity as a truthful public record, it proceeded to foreclose its mortgage. There was nothing in the record to warn it of any danger. It had the legal right to believe the record true, and act accordingly. As the record stood, it did not affect or impair the defendant's mortgage lien; as corrected, it may possibly have affected or impaired it. The condition of the record may, and probably did, greatly influence this defendant in the amount it bid at its foreclosure sale. The amount it could safely bid would certainly be materially affected by the fact of whether the plaintiff's lien of \$1,240 was prior and paramount to that of the mortgage lien. If its interest and rights were materially affected and jeopardized by the change and amendment of such date, it was error to allow it as against this defendant Loan Company, however proper and legal as against Royal. The burden of proof in this case was upon plaintiff to show that this defendant's rights were not impaired by this amendment; and the court below erred in holding that the mechanic's

lien of the plaintiff upon said lot was paramount and superior to the mortgage lien of this defendant Loan Company. The order of the district court denying the defendant's motion to vacate the order for judgment, and denying a motion for a new trial, is reversed.

(Opinion published 56 N. W. Rep. 594.)

Application for reargument denied December 6, 1893.

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STATE OF MINNESOTA *vs.* CLARENCE A. ROBINSON.

Submitted on briefs Oct. 23, 1893. Reversed Oct. 27, 1893.

No. 8318.

**Criminal liability of principal for unauthorized act of his agent.**

The owner of a drug store is not liable, under Laws 1885, ch. 147, § 12, regulating the practice of pharmacy, as amended by Laws 1891, ch. 104, for a sale by one in his employ, not a registered pharmacist or assistant, made without his knowledge or assent.

Appeal by the defendant, Clarence A. Robinson, from an order of the Municipal Court of the City of Minneapolis, *Stephen Mahoney, J.*, made March 8, 1893, denying his motion for a new trial.

Defendant kept a drug store at No. 2901 on Washington Avenue North, in Minneapolis and employed therein Joseph Fremstad, a boy nineteen years old, to keep the store clean, sell cigars, soda water and notions and learn the business. The boy had orders from the defendant not to put up or sell any drugs, medicines or prescriptions. On August 26, 1892, while defendant was away at dinner, Fremstad sold to Robert G. Walton, at his request, an ounce of laudanum for ten cents. On August 27, 1892, while defendant was absent for a few moments to get a suit of clothes, Fremstad sold to Andrew Dickey, at his request, one half ounce of tincture of rhubarb and some chloroform for forty five cents. Defendant was a registered pharmacist and did not know or hear of these sales by his unlicensed employee until this action was commenced against him on October 12, 1892.

This action was brought in the name of the State by the State Board of Pharmacy to recover the penalty of fifty dollars for each of the sales so made. The Court made findings of the facts and ordered judgment for plaintiff for \$100. Defendant moved for a new trial and being denied appeals.

*Penney, Jamison & Hayne*, for appellant.

Robinson did not permit the compounding or dispensing of prescriptions or the vending of drugs, medicines or poisons in his store or place of business by Fremstad. The word "permit" should be construed as requiring some affirmative act, or at least connivance on the part of Robinson. *State v. Mahoney*, 23 Minn. 181; *Whitcomb v. State*, 30 Tex. App. 269; *Commonwealth v. Nichols*, 10 Met. 259.

*McHale & Abell* and *F. M. Nye*, for respondent.

The law places the registered pharmacist in charge of the store and instructs him that his duty is to protect the public. The question is, did Robinson, as such registered pharmacist and proprietor, "permit" these sales in violation of the Pharmacy Act, Laws 1885, ch. 147, as amended by Laws 1891, ch. 104? *Cowley v. People*, 83 N. Y. 464; *Ex parte Eyston*, 7 Ch. Div. 145; *Commonwealth v. Curtis*, 91 Mass. 266; *Mogler v. State*, 47 Ark. 109; *State v. Kittelle*, 110 N. C. 560; *Pharmaceutical Society v. Wheeldon*, 24 Q. B. Div. 683; *State v. Mueller*, 38 Minn. 497; *Bond v. Evans*, 21 Q. B. Div. 249; *Haas v. The People*, 27 Ill. App. 416.

GILFILLAN, C. J. This is an action to recover two penalties such as are imposed for violating Laws 1885, ch. 147, as amended by Laws 1891, ch. 104. The section the provisions of which are claimed to have been violated is section 12 as amended, and which provides: "Any registered pharmacist or other person who shall permit the compounding or dispensing of prescriptions or the vending of drugs, medicines or poisons in his store or place of business, except under the supervision of a registered pharmacist, or by a registered assistant \* \* \* shall for each and every offense be liable to a penalty of fifty dollars." The chapter contains elaborate provisions to secure on the part of registered pharmacists and assistants the re-

quisite knowledge and skill in the business of conducting a drug store or transacting a pharmacy business.

As found by the court below, defendant had in his employment in his drug store, to clean up the store, sell cigars, soda water, patent medicines, and notions, one Fremstad, who was not a registered pharmacist or assistant. When he employed Fremstad he instructed him that he must not sell any drugs or poisons, or prepare any prescriptions. Defendant attended the business at his store, and was there during the greater part of the time, with short absences. During two of these absences Fremstad made the sales which are charged against defendant as violations by him of section 12.

It is not found that he actually knew of or directly authorized the sales.

But it is claimed that he permitted the sales within the meaning of the section; that within its meaning the owner of a drug store permits on the part of his employes what he does not prevent. As always used, the word "permit" includes the element of assent. When used in a statute to describe an action made penal it must be held to include that element, unless there be something in the context clearly indicating the contrary. It is, of course, necessary for druggists to employ in and about their stores persons who are not registered pharmacists or assistants. The statute (Sections 2 and 4) contemplates that they may have such for the purpose of learning the business. It would be hard upon the owners of such stores to make them liable penally for the acts of such persons done without their knowledge, and contrary to their instructions. There is nothing in the statute showing an intent to go so far as that.

Order reversed.

Note. On November 21, 1893, an order was entered affirming the refusal of the clerk of this court to tax costs against the State Board of Pharmacy.

(Opinion published 56 N. W. Rep. 594.)



**CITY POWER CO. vs. FERGUS FALLS WATER CO.**

Argued Oct. 17, 1893. Reversed Nov. 8, 1893.

No. 8428.

**A lease of water power construed.**

Certain provisions in a lease of water power and contract to furnish water, construed.

**Landlord liable to tenant for infringement done with his aid and consent.**

It is no defense to a tenant's claim that his rights under a lease have been invaded and infringed upon, to say that the invasion and infringement were the acts of another tenant, when they have been performed with the landlord's consent and active concurrence.

Appeal by defendant, the Fergus Falls Water Company, from an order of the District Court of Otter Tail County, *L. L. Baxter, J.*, made August 29, 1893, denying its motion for a new trial.

The plaintiff, the City Power Company, is a corporation and owns a dam across the Red River at Fergus Falls and the waterpower on that river created thereby. The defendant is also a corporation engaged in supplying the City and its inhabitants with water through pipes laid beneath the streets. It operates its works and maintains a pressure in its pipes by pumps propelled by waterpower which it leased from the former owner, the grantor of the City Power Co. This action was brought January 5, 1893, to recover \$1,490.15 rent past due and unpaid. The defendant the Water Co. answered and for counterclaim alleged that plaintiff and its other tenants had infringed upon defendant's rights under its lease and obstructed and diminished the supply of water to which it was entitled so that it was compelled to purchase and put in a steam engine to run its works to its damage \$5,000, and it prayed judgment against plaintiff for the balance, \$3,509.85. A jury was waived and the issues were tried July 18, 1893. Findings of fact were filed and judgment ordered for the plaintiff for the amount of its claim with interest. The Water Co. moved for a new trial, but was refused and it appeals. The facts were not in dispute. The sole question was upon the construction of the lease; whether by it the right to supply

to Kirk, another tenant, waterpower for his flouring mill was paramount to the right of the defendant to water power to run its plant.

*Mason & Hilton*, for appellant.

*W. E. Dodge*, for respondent.

COLLINS, J. To dispose of this appeal, which is from an order denying defendant's motion for a new trial in an action brought to recover an amount alleged to be due as rent under the terms and conditions of a certain written lease, we have simply to consider and construe a portion of the instrument, there being no controversy over the facts. The lease was executed between plaintiff's predecessor in interest and this defendant on August 1, 1883, and demised to the latter for a period of years a lot of land embraced in a mill reserve and site, the right to lay and maintain certain water mains, the right to construct and maintain on a specified tract of land above the mill dam, "and extending into the river a sufficient distance to take therefrom water for power and other purposes hereinafter leased and permitted to be taken," necessary head works and head gates for the purpose of receiving and controlling the water to be taken, used, and received by defendant. It was stipulated that "said head works and head gates are, however, to be so constructed, erected, and maintained as not in any way to affect the permanence or stability of the so-called 'Austin Dam,' now erected across the river mentioned heretofore, *or to hinder or prevent the free and uninterrupted use of the water through the flumes and bulkheads already built*, or through any flumes or bulkheads that may hereafter be made." Provision was also made for the construction and maintenance by defendant of flumes, waste gates, and a tailrace, and it was then agreed that the latter should have the right "to draw from the mill pond above said so-called 'Austin Dam' a sufficient quantity of water to supply through the waterworks" of this defendant "the demands, requirements, and necessities of the city of Fergus Falls, and the inhabitants of said city and vicinity: provided, however, that the water so drawn at any one time shall not exceed in quantity the equivalent of the amount which a one hundred horse power can pump." The lease also granted to defendant sufficient water power "from above the dam to propel

and operate its waterworks, \* \* \* but not, however, to an amount to exceed one hundred horse power, as measured and calculated upon water wheels of approved pattern." It appears that when this lease was executed there was a mill, owned by the lessor, and in operation, upon this water power, and in connection and for use therewith flumes and bulkheads had been constructed. Some two years later the lessor sold this mill to one Kirk, and at the same time entered into a contract with him to furnish to him, and by means of the flumes and bulkheads referred to in its lease to defendant as already built, sufficient water power to run and operate the mill. Defendant was then in possession of the premises, power, and privileges mentioned in its lease. Kirk took possession of the mill, and has since run and operated it, using the water power contracted for. By reason of this defendant has been deprived of the quantity of water and the amount of power it contends it was entitled to, under the terms of the lease, during the period of time for which plaintiff attempted to recover rent. Certain it is that if the defendant was entitled to any specified quantity of water under its lease, without regard to what might be needed for the use and operation of the Kirk mill, it was not available, and could not be had, because of such use and operation.

Counsel for plaintiff contends very ably and zealously that by reason of the words which we have italicised in one of the foregoing quotations from the lease there was reserved and excepted from the grant to defendant such water and water power as was or would thereafter be necessary to use in the operation of the mill then being supplied by means of the flumes and bulkheads already built. In other words, he contends that defendant's right to use any water, to have any water power, was wholly subordinated to the needs and necessities of the existing mill, notwithstanding its absolute and unconditional agreement found in the lease to pay a fixed annual rental, not at all dependent upon what it might receive, for the ensuing thirty years. A construction which would work an injustice of that magnitude should not obtain, unless the terms and conditions of a contract through which it is sought are clear and unmistakable. In our judgment, there is no room for any such construction of the one now before us; nor do we understand that the learned trial court so held. Authority was conferred upon defendant to extend its works

into the mill pond such distance as might be necessary for the proper reception of the water supply, and there to construct and maintain such essential adjuncts as head works and head gates, all to be constructed and maintained so that they would not affect the performance or stability of the mill dam, or hinder or prevent the free and uninterrupted use of water through the existing flumes and bulkheads. Again, those works and adjuncts were to be so constructed and maintained that they should not hinder or prevent the free and uninterrupted use of water through the flumes and bulkheads to be put in at some future time, undoubtedly for the purpose of supplying other mills which might be erected at or below the dam. The construction claimed would not only allow the defendant to be deprived of such water as it might need and had agreed to pay for, if it was necessary for the proper operation of the Kirk mill, but would permit other mills to be supplied with water through newly-built flumes and bulkheads, at the lessor's pleasure, and in total disregard of the lessee,—a most absurd result. In this connection we may say that the argument of counsel that the language in the lease providing for such flumes and bulkheads to be subsequently erected only referred to repairs upon, or the rebuilding of, those already in, is without merit, for the words used are unambiguous, and their meaning is plain. Another absurdity would follow should we adopt the views of plaintiff's counsel. The defendant was to take its water from above the dam, and, of course, from above the existing or contemplated flumes and bulkheads. If it took any at all, when there was no overflow at the dam, it would necessarily hinder and prevent such as it took from passing through flumes and bulkheads below. This, of itself, if plaintiff is right in its contention, would invade its rights to have the free and uninterrupted use or flow of the water through said flumes and bulkheads. Evidently these clauses were inserted for the purpose of preventing the lessee from constructing its head works and head gates so as to cut off and render worthless the flumes and bulkheads then in, and also to prevent such construction and maintenance as would effectually stop further improvement of the power. It is not claimed by plaintiff that this provision has been violated by defendant. The parties may not have had in mind a deficiency of water when entering into the contract, but neither can now be aided by a forced and unnatural

construction of the same. Had it been intended that defendant's right to water should be made secondary to the claims of those engaged in running the Kirk mill, and that the latter should first be served, that intent could easily have been expressed, and made a part of the agreement. This was not done, and, letting the contract speak for itself, we cannot evade the conclusion that defendant was to have precedence in the water supply, not to exceed the quantity mentioned, and also not to exceed the horse power specified.

There is nothing in the point that because the natural flow of the water in the stream was interfered with by another mill situated above plaintiff's dam and water power, the latter should be permitted to recover, for in the case as presented it is evident that defendant's failure to secure the quantity of water and the power mentioned in the lease was due to an insufficiency of water and power for both defendant and Kirk, not to an insufficiency when the former only was being supplied. We need not discuss at length the suggestion that Kirk was liable to defendant instead of plaintiff, and hence the former cannot resist the payment of rent. It is no defense to a tenant's claim that his rights under the lease have been invaded and infringed upon, to say that the invasion and infringement were the acts of another tenant, when they have been performed with the landlord's consent and active concurrence. *Twiss v. Baldwin*, 9 Conn. 291; *Clement v. Gould*, 61 Vt. 573, (18 Atl. Rep. 453.) See, also, *Collins v. Lewis*, 53 Minn. 78, (54 N. W. Rep. 1056.)

Order reversed.

(Opinion published 56 N. W. Rep. 635.)

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ON APPLICATION FOR REARGUMENT.

Denied Nov. 29. 1893.

PER CURIAM. Upon motion for rehearing. It is possible that upon the evidence this court was not fully justified in asserting, as it did in the opinion, that defendant's failure to obtain the quantity of water and all of the power granted to it by the lease was due to an insufficiency for both Kirk and itself. But in the fourth subdivision

of the reply plaintiff admits the leasing of power and water to Kirk, alleges that he has entered into possession of the same, and "has since continued to operate, control, and use the same." Again, in the same subdivision, it is alleged that the quantity of water used by Kirk under his lease is the same, and not in excess of the quantity excepted and reserved from the grant to defendant. The theory of the entire reply to the counterclaim is that Kirk was entitled to use the water and power leased to him at all events, and in disregard of defendant's lease; not that for a time he failed or omitted to use any water whatsoever, and hence that he did not interfere with defendant. As we construe the reply, the point raised by Kirk's testimony that he did not use any water in the winter of 1889-90 was not in issue; and from the entire record, including the "note" of the trial judge, it seems plain that it was taken for granted upon the trial that the defendant's supply was reduced below the amount it was entitled to have by the use of water at Kirk's mill. For these reasons, if for none other, the motion must be denied.

(Opinion published 56 N. W. Rep. 1006.)

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**CHARLES GIBSON vs. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RY. CO.**

Argued Oct. 27, 1893. Affirmed Nov. 8, 1893.

No. 8076.

**Charge to jury urging an agreement.**

It was not error for the trial court to instruct the jury, after they had been out some twenty hours without agreeing upon a verdict, to the effect that if one or two of their number differed in their views of the evidence from the others they should be thereby induced, although not required to surrender conscientious convictions, to doubt the correctness of their own judgments, and should be led to inquire whether they were not mistaken.

**Request to charge, embraced in the general charge.**

*Held*, upon an examination of a request to charge made by counsel for defendant and rejected by the court, that the substance of the request was fully covered in the general charge.

**Verdict sustained by evidence.**

*Held*, further, that a verdict in plaintiff's favor was sustained by the evidence.

Appeal by defendant, the Minneapolis, St. Paul and Sault Ste. Marie Railway Company, from an order of the District Court of Ramsey County, *Hascal R. Brill, J.*, made August 8, 1892, denying its motion for a new trial.

The plaintiff, Charles Gibson, was a locomotive engineer employed by defendant on a switch engine in its yard at Gladstone, Michigan. He claims he was injured on August 29, 1890, by a fall in the cab of this engine. The foot board on which he stood while running the engine was eight inches above the floor of the cab. It became loose at one end and finally went down, throwing plaintiff against a box in the cab and injuring him internally. He testified that on August 25 he entered in the repair book at the engine-house a request to fix this foot board, that it was not fixed and that it fell on August 29. Frank Gaul, the fireman on the engine, testified that the foot board did not fall down, that on a former trial he had testified falsely, at plaintiff's instance, that it did, and that he had fixed it up again the same evening. John Bellaire, another witness, testified that no entry was made in the repair book as to this engine on August 25, that Gibson came to the engine-house the next March and made the entry at that time in his presence and induced him to falsely testify on the former trial that the entry was made on August 25, 1890. Plaintiff's cause of action rested upon his report of August 25, 1890, in the repair book and the promises made by the foreman of the engine-house on August 26, and 28, to fix the foot board. Without this report and promise no liability of the Railway Company was shown.

Plaintiff had a verdict for \$4,000. Defendant moved for a new trial, but was refused and it appeals. The principal discussion in this Court was upon the evidence, whether it was sufficient to sustain the verdict.

*C. D. & Thos. D. O'Brien and Alfred H. Bright, for appellant.*

After the jurors had retired to consider of their verdict and had returned and announced to the Court their inability to agree, the

Court not only urged the jury to agree because the trial was long and expensive to the parties, but directed remarks to individual jurymen and in effect suggested to the one or two jurymen who were standing out, that they should yield their individual opinion to the opinion of the majority. This was error. *McNulty v. Stewart*, 12 Minn. 434; *Clem v. State*, 42 Ind. 420; *Richardson v. Coleman*, 131 Ind. 210; *Edens v. Hannibal & St. J. R. Co.*, 72 Mo. 212; *Cranston v. New York C. & H. R. R. Co.*, 103 N. Y. 614; *Pierce v. Pierce*, 38 Mich. 412; *Goodsell v. Seeley*, 46 Mich. 623; *Stoudt v. Shepherd*, 73 Mich. 588; *Whitelaw v. Whitelaw*, 83 Va. 40.

*George B. Edgerton, John D. O'Brien and John A. Lovely*, for respondent.

The statements to the jury on their return into Court were proper. *McNulty v. Stewart*, 12 Minn. 434; *Watson v. Minneapolis Street Ry. Co.*, 53 Minn. 551; *Commonwealth v. Tvey*, 8 Cush. 1; *State v. Smith*, 49 Conn. 376.

**COLLINS, J.** Action for damages alleged to have been the result of defendant's negligence while plaintiff was in its employ as a locomotive engineer. He worked a switching locomotive of peculiar construction. In the cab, elevated from the floor, was a narrow foot-board or platform upon which the engineer stood when at work, that he might be the better enabled to see signals given by switchmen outside, and to handle the locomotive. On one end of this board or platform was a movable box. The plaintiff claimed that this footboard became loose; that he twice notified Bardsley, the person in charge of repairs, of this fact, and also called for its repair by means of a book kept in the office for that purpose; that he was assured and promised by Bardsley that the repairs should be made, and told to go on with his work; that he did continue to use the locomotive, relying on the assurance and promise; and that a few days afterwards, on the 29th day of August, about 6 o'clock P. M., the board or platform gave way while he was handling the locomotive, throwing him down upon the floor of the cab, and upon the box before mentioned, and causing the injuries complained of. The case was twice tried before the same district Judge, and



a verdict obtained for the plaintiff each time. The first verdict was set aside, really upon the sworn confessions of two of plaintiff's most important witnesses that they had perjured themselves when testifying in his behalf. As may be surmised, this condition of affairs aroused the counsel for the respective parties, and led to a protracted and closely fought struggle when the case again came on for trial. We are warranted in saying, after an examination of the complete record, that nothing was omitted which would tend to develop the truth, and aid the jury in arriving at an intelligent verdict, by the able counsel employed to try the case.

Taking such of the assignments of error as need be referred to in order, we find that the first is addressed to the refusal of the court to charge as requested by defendant, in effect, that plaintiff could not recover for any injury except that received on August 29th, at the time one Burton took the engine, finished the work, and afterwards aided the plaintiff to his house; and, if the jury found the injury was really received October 30th, the verdict must be for the defendant.

Counsel for defendant spent considerable time during the trial in an attempt to show that plaintiff received the injuries of which he complained on the 30th of October, and that an illness which attended him about August 29th, and for a few weeks afterwards, was brought about by overwork and a cold; not by a fall in the cab. This claim was made a very prominent feature of the defense, and was again and again rendered conspicuous in the trial. The jurors understood the precise point, and its significance to the litigants, and every one must have fully comprehended that part of the general charge of the court which was designed to, and which, in our opinion, fully covered the proposition embodied in the request, although not in the same language. The court clearly stated, what had been so often admitted by both parties, that the plaintiff, if he recovered at all, could not recover for injuries received at a subsequent time, nor for any injuries except those caused by the giving way of the board or platform, and for no defect except that. The court repeated this language in substance later in its charge, and it contained everything found in the rejected request, except a direct reference to the witness Burton. This was unnecessary for the information of the jury, for there was no question in the case

but that the injuries complained of were those which were received when Burton boarded the locomotive, finished the work, and then assisted plaintiff to his house. The latter so testified, fixing the date as August 29th. Although counsel made a strong effort to show that it was actually in the month of October, and not in August, it is to be noted that nothing of this nature was attempted through the testimony of Burton. He was a witness for the defense, remembered the occasion, but did not testify that it was not on the day alleged by plaintiff. It is obvious that the court did not err in its refusal.

Proceeding to a consideration of the second and third assignments of error, it may be said that after the jury had been out some twelve hours they were brought into the court room, and it was announced that no agreement had been reached. The court thereupon addressed them as to the advisability of making further and strenuous efforts in that direction, and again sent them out. They then deliberated about nine hours, and again stated their inability to agree. The court thereupon remarked that it was of importance that a verdict be secured; that, while it had no means of knowing how they stood, if there should be one or two men who were unable thus far to reconcile their views with those held by their associates, it would be worth while for them to consider, in view of the fact that so many jurors equally as honest and of as good judgment took an opposite view, whether they were not mistaken. But they were also told that they were not called upon to surrender conscientious views which they might hold of the case in order to reach a verdict. Further remarks along these lines were made by the court, and the jury again retired. A verdict for plaintiff resulted. Ignoring the point made that no proper exception was taken to any part of this language, we fail to see wherein the court erred. It had the right to urge that efforts should be made to agree, and that, upon a comparison of views, it might be well to consider and heed the judgment of other men. The purport of this instruction was that, if any of the jurors differed in their views of the evidence from a large number of their fellows, such difference of opinion should induce the minority to doubt the correctness of their own judgments, although not required to surrender their own conscientious convictions, and lead them to a re-examination and closer scrutiny of the

facts in the case for the purpose of revising and reconsidering their preconceived opinions. These instructions were sound, and well-adapted to the situation. *Commonwealth v. Tucey*, 8 Cush. 1; *Commonwealth v. Whalen*, 16 Gray, 28; *State v. Smith*, 49 Conn. 376. See, also, *McNulty v. Stewart*, 12 Minn. 434, (Gil. 319;) *Watson v. Minneapolis St. Ry. Co.*, 53 Minn. 551, (55 N. W. Rep. 742.) The language used by the court below does not come within the scope of the cases cited by defendant, as will be seen upon comparison.

It is contended that the plaintiff was guilty of contributory negligence in continuing to use the footboard in its defective condition, and in not repairing or removing it. That he could have repaired it himself, or that he could have run the locomotive with it entirely removed, does not demonstrate the correctness of this contention. By a rule of the company, employes were required to report defects, or to repair the same themselves. There was a positive injunction to do one thing or the other. The plaintiff claimed that he had complied with this rule by reporting the defect to the proper person, and had been twice assured that it should be repaired. That the plaintiff could have repaired it himself did not relieve the defendant company from the duty imposed upon it to repair when duly notified of the existence of the defect.

It is urged that the verdict was not justified by the evidence. Counsel for defendant company, in support of this position, have analyzed and commented upon certain points in the proofs in a most vigorous and able manner. We are obliged to admit that there is great force in their argument, but we cannot justly say that the verdict was without evidence to support it. The plaintiff's testimony was sufficient to establish his cause of action, and evidently the jury believed him as against the many witnesses produced in opposition. The remarkable circumstances under which one or two of defendant's witnesses testified at the second trial, having been for plaintiff at the first, made this an unusual case, and rendered the trial Judge, who had presided at both trials, and the jury, peculiarly well qualified to determine where the truth was, much better than an appellate court. We are compelled to disagree with counsel in their assertion that by the proofs plaintiff's statement concerning his report of repairs needed upon his locomotive, and his version of the accident, were conclusively shown to be false.

Finally, although it does not bear on a determination of the case, we feel constrained to say that in our opinion counsel for defendant are not at all warranted in assuming that the remark made in the memorandum attached to the order of the court below, refusing a new trial, concerning certain witnesses, was intended to be or is a reflection upon their professional character or integrity. We feel confident that no disinterested person reading the remark would suspect that these gentlemen were thought by the court to be instrumental in procuring the witnesses who at the first trial had testified in behalf of the plaintiff to bear false witness against him upon the second; and we are equally as certain that the careful, conscientious, and learned trial Judge who penned this remark would be among the last to reflect, intentionally or inadvertently, upon the good name and fame of respectable gentlemen. He had presided at both trials, had seen these self-confessed perjurers when testifying on both occasions, and expressed an opinion as to when they falsified. From what he said it could not be inferred that he charged corrupt practices upon the defendant or its attorneys. Nothing of that nature could reasonably be implied.

Order affirmed.

(Opinion published 56 N. W. Rep. 636.)

Application for reargument denied November 22, 1893.

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STATE *ex rel.* FRED. WEIDEMAN *vs.* FRANK HORGAN.

Argued by appellant Nov. 1, 1893. No appearance by respondent. Reversed  
Nov. 8, 1893.

No. 8414.

**The Oleomargarine acts constitutional.**

The provisions of Laws 1891, ch. 11, "An act relating to the sale of imitation butter," are valid as a legitimate exercise of the police powers of the state.

**Sale of imitation butter is a misdemeanor subjecting to arrest.**

The offense prohibited in section 1 of said Act is a misdemeanor, and the penalty therein specified is to be recovered in accordance with the provisions of 1878 G. S. ch. 78, § 10, by a criminal prosecution in a court of competent jurisdiction.

Appeal by Frank Horgan, a police officer of the City of Duluth, from an order of the District Court of St. Louis County, *J. D. Ensign, J.*, made June 14, 1893, discharging the relator, Fred Weideman, from his custody.

On May 23, 1893, John M. Bohrer made complaint on oath in the Municipal Court of the City of Duluth that Fred Weideman did on May 10, 1893, in that City unlawfully sell oleomargarine to E. J. Graham, of another color than bright pink, contrary to Laws 1891, ch. 11. A warrant was issued and delivered to policeman, Frank Horgan to execute. He arrested Weideman June 6, 1893, and was about to take him into the Municipal Court. Weideman presented his petition or relation to the District Court and obtained a writ of Habeas Corpus commanding Horgan to have the body of Weideman with the time and cause of his detention before the District Court, to do and receive what should there be considered concerning said Weideman.

The policeman, Horgan, made return that he held Weideman under and by virtue of the warrant from the Municipal Court. After hearing the parties, the Court of June 14, 1893, made an order discharging Weideman from custody. From that order this appeal is taken.

*H. F. Greene* and *A. H. Crassweller*, for appellant.

The violation of this law was a criminal offence. *State v. West*, 42 Minn. 147; *State v. Cotton*, 29 Minn. 187; *Dawson v. St. Paul F. & M. Ins. Co.*, 15 Minn. 136; *State v. Marshall*, 64 N. H. 549.

There was no appearance for respondent.

**COLLINS, J.** In their brief herein, counsel for the appellant discuss two questions: First, the constitutionality of the act for a violation of which the relator, Weideman, was arrested, entitled "An act relating to the sale of imitation butter," Laws 1891, ch. 11; and; Second, the method of procedure under the same.

Laws of this import, having in view the same general purpose, although relating, sometimes, to other articles, are nothing new in the legislation of this and other states. In other jurisdictions, so far as we are informed, they have uniformly been sustained as being within the police power of a state, and it is certain that they,

as well as others with more stringent provisions, have been upheld in this court. *Butler v. Chambers*, 36 Minn. 69, (30 N. W. Rep. 308;)  
*Stolz v. Thompson*, 44 Minn. 271, (46 N. W. Rep. 410;)  
*State v. Aslesen*, 50 Minn. 5, (53 N. W. Rep. 220.)

As to the views of other tribunals, see *Powell v. Pennsylvania*, 127 U. S. 678, (8 Sup. Ct. Rep. 992, 1257;)  
*State v. Addington*, 77 Mo. 110; *Powell v. Commonwealth*, 114 Pa. St. 265, (7 Atl. Rep. 913;)  
*People v. Arensberg*, 105 N. Y. 123, (11 N. E. Rep. 277;)  
*State v. Marshall*, 64 N. H. 549, (15 Atl. Rep. 210,) in which a statute almost identical with Laws 1891, ch. 11, was under consideration. There is no question whatever of the constitutionality of such legislation.

As we understand the position of the relator, (and we presume that it was upon this point that the District Judge ordered him to be released from custody,) the Municipal Court was without jurisdiction to issue a warrant for his arrest, but should have proceeded, and could only proceed, against him to recover the prescribed penalty as in a civil action. The statute provides (section 1) that "whoever by himself or agent shall sell, expose for sale or have in his possession with intent to sell any article or compound made in imitation of butter or as a substitute for butter and not wholly made from milk or cream and that is of any other color than bright pink, shall be subject to the payment of a *penalty* of fifty (50) dollars and for a second and each subsequent *offense* a *penalty* of one hundred (100) dollars, to be recovered with costs in any court of competent jurisdiction." We have purposely italicized certain words in the above quotations. In section 3, possession of the article or substance "prohibited" by the act is made *prima facie* evidence that the same is kept in "violation" thereof. Moneys derived from "fines" are to be paid into the state treasury, and in section 2 proceedings to enforce the provisions of the law are called "prosecutions."

It will thus be seen that the act forbidden is styled an "offense," the words "penalty" and "fine" are used interchangeably, the article or substance against which the legislation is directed is referred to as "prohibited," and also as kept in "violation" of the act, while proceedings to enforce its provisions are called "prosecutions." We think it very clear that the legislature contemplated the enactment

of a penal statute. By the Penal Code, § 3, a crime is defined as an act or omission forbidden by law, and, upon conviction, punishable by death or imprisonment or fine, or other penal discipline. By section 4, crimes are divided into felonies and misdemeanors, the latter embracing every crime not punishable by either death, or imprisonment in the state's prison. Now the selling of the article or substance mentioned in chapter 11, unless it be colored a bright pink, is an act forbidden by law; it is a public offense. Upon conviction, a pecuniary penalty is imposed, and this is nothing more or less than a fine, according to the lexicographers. The offense is a misdemeanor, and the penalty, or fine, is to be recovered in accordance with the provisions of 1878 G. S. ch. 78, § 10, by a criminal prosecution in a court of competent jurisdiction. To hold that the penalty can only be recovered in a civil action would in many instances nullify the law, and enable the impecunious to defy it, and its consequences when violated, with impunity.

Reference has been made to a New Hampshire statute as almost identical with that under consideration, and passed upon in *State v. Marshall*, *supra*. There is practically no difference in the language, but in New Hampshire the word "fine" was used where the word "penalty" appears in the act of 1891. We have no doubt that our statute was copied from that considered and construed in *State, v. Marshall* in 1888, and in that case this same question was raised, among others. It was held that, in the absence of any special provision, the word "fine" determined the remedy, and that it was by a prosecution in the criminal courts. It might possibly be suggested, in view of the fact that the law of 1891 was adopted from another state, after it had been construed in 1888, that there is a deep significance in the use of the word "penalty" instead of the word "fine." If it had been intended by our legislature to so radically change the method of procedure from that already determined as proper by the courts of New Hampshire as to render it a civil action instead of criminal, the statute would have spoken upon the subject with no uncertain sound.

Order reversed.

BUCK, J., took no part in this case.

(Opinion published 56 N. W. Rep. 638.)

BENJAMIN F. MARTIN vs. A. H. HORNSBY *et al.*55 187  
d72 187

Submitted on briefs Oct. 20, 1893. Affirmed Nov. 8, 1893.

No. 8352.

**A bond signed by sureties but not by the principal.**

A bond purporting to be the joint and several obligation of one who is about to be commissioned as a notary public, as principal, and of others as sureties, but which has been executed by the sureties only, does not, upon its face, show any contract obligation on the part of such sureties.

**Evidence held not to show delivery of the bond by the sureties, or estoppel by conduct.**

Upon an examination of the evidence presented upon the trial of this case, it is *held* that said sureties had not, by their conduct, subjected themselves to liability upon the instrument, nor become estopped from questioning its validity because unfinished and incomplete.

Appeal by plaintiff, Benjamin F. Martin, from an order of the District Court of Ramsey County, *Charles D. Kerr, J.*, made June 14, 1893, denying his motion for a new trial.

On August 7, 1885, defendant, A. H. Hornsby was appointed a notary public for Ramsey County for the term of seven years. He was required by 1878 G. S. ch. 26, § 2, as amended by Laws 1885, ch. 48, before entering upon the duties of his office to give a bond to the State in the penal sum of \$2,000 with sureties to be approved by the Governor, conditioned for the faithful discharge of his duties as such officer. The defendants, Uri L. Lamprey and Charles W. Clark signed such a bond as sureties, but Hornsby omitted to sign it. The bond in this condition was inadvertently approved and his commission issued.

In June, 1892, Hornsby represented to the plaintiff that he was the agent of Antonia Wortman to sell for her the east thirty four (34) feet of lot nine (9) in block five (5) in Nelson's Addition to St. Paul. He produced and delivered to plaintiff a deed purporting to have been signed by her, on which he as such notary public certified under his hand and official seal, that she appeared before him on June 20, 1889, and acknowledged that she executed the deed



freely and voluntarily. Plaintiff paid Hornsby \$600 for the property, but discovered afterwards that Mrs. Wortman never signed the deed or acknowledged the execution of it or received the money, and that Hornsby never was her agent or authorized by her to sell the property. Hornsby disappeared and plaintiff obtained leave under 1878 G. S. ch. 78, § 2, and brought this action in his own name upon the bond to recover his \$600 of the sureties. On the trial the Judge instructed the jury to return a verdict for defendants. Plaintiff excepted and moved for a new trial. The Court refused, saying,

There are authorities that such a bond is void on its face. *Curtis v. Moss*, 2 Rob. (La.) 367; *Bean v. Parker*, 17 Mass. 591; *Wood v. Washburn*, 2 Pick. 24; *Bunn v. Jetmore*, 70 Mo. 228; *City of Sacramento v. Dunlap*, 14 Cal. 421. But I think when such a bond has been delivered by the sureties as the official bond of the principal without his signature or seal, under circumstances which constitute a waiver of the defect and it has been accepted and acted upon, the sureties are estopped to deny their liability. But where it is manifest that the sureties did not intend to be bound without their principal and have done nothing to estop themselves they cannot be held. *Kurtz v. Forquer*, 94 Cal. 91; *Hall v. Parker*, 37 Mich. 590; *Johnson v. Kimball*, 39 Mich. 187; *Goodyear D. V. Co. v. Bacon*, 151 Mass. 460; *Fletcher v. Austin*, 11 Vt. 447; *Wildcat Branch v. Ball*, 45 Ind. 213; *Smith v. Board of Supervisors of Peoria Tp.*, 59 Ill. 412.

In this case the sureties executed the bond with the expectation that it was to be executed by the principal also. They did not deliver the bond or consent to its delivery in the condition in which it appears. Its acceptance and approval by the Governor was a mistake and inadvertence. The bond is joint and several, but this does not affect the principle upon which the case turns. *State v. Austin*, 35 Minn. 51.

*H. H. Herbst*, for appellant.

In a joint and several bond the sureties are liable, even though the instrument is not signed by the principal. *Trustees of Schools v. Sheik*, 119 Ill. 579; *State v. Bowman*, 10 Ohio, 445; *Parker v. Bradley*, 2 Hill, 584; *Kurtz v. Forquer*, 94 Cal. 91; *County of Red-*

*wood v. Tower*, 28 Minn. 47; *Haskins v. Lombard*, 16 Me. 140; *Loew v. Stocker*, 68 Pa. St. 226; *Grim v. School Directors*, 51 Pa. St. 219; *Van Norman v. Burbeau*, 54 Minn. 388.

*Charles N. Bell and George E. Budd*, for respondents.

A surety is never bound to any greater extent than is his principal. This instrument is imperfect on its face and shows that it was never intended to be delivered in its present condition. It is absurd to think that the sureties so intended and it ought to require convincing testimony to prove an intentional delivery without the signature of the principal. *State v. Austin*, 35 Minn. 51; *Board of Education v. Sweeney*, 1 S. Dak. 642; *Wildcat Branch v. Ball*, 45 Ind. 213; *Johnston v. Kimball*, 39 Mich. 187; *Fletcher v. Austin*, 11 Vt. 447; *People v. Hartley*, 21 Cal. 585; *City of Sacramento v. Dunlap*, 14 Cal. 421; *Ferry v. Burchard*, 21 Conn. 602.

COLLINS, J. The question of law presented in this appeal is whether the sureties named in, and who signed, an instrument designed to be the bond required, under 1878 G. S. ch. 26, § 2, of a person about to be appointed a notary public, are bound by its conditions when the principal has failed to sign the same. The instrument purported to be the joint and several obligation of "A. H. Hornsby as principal, and U. L. Lamprey and Chas. W. Clark as sureties." It was conditioned that "the above-bounden A. H. Hornsby" should faithfully discharge the duties of a notary. Through inadvertence in the office of the chief executive, the failure on the part of the principal to sign the purported obligation was overlooked. It was approved, and a commission issued.

The statute above referred to clearly contemplates the execution of a bond, with the appointee as the principal, and with sureties; and this is more apparent when we read, in connection, the first three sections of 1878 G. S. ch. 78, which authorize and provide for the bringing of actions upon official bonds. So the bond in question was not executed in compliance with the law, but was unfinished and incomplete. Speaking of a somewhat similar instrument, this court said, in *State v. Austin*, 35 Minn. 51, (26 N. W. Rep. 906,) that: "Upon its face, the bond appears to be incomplete. It was not the

obligation of the principal named. It did not, so far as appears, bind the sureties, because, as appears from the instrument, the obligation which they assumed was that of sureties for another, who was to be the principal obligor. It was not, therefore, of effect, as the bond of even those who executed it." This language is in point here, and, in addition to cases there noted, attention may be called to *Curtis v. Moss*, 2 Rob. (La.) 367; *Board of Education v. Sweeney*, 1 S. Dak. 642, (48 N. W. Rep. 302,) and cases cited. *Prima facie*, the instrument now being considered was incomplete and invalid, and was not binding upon those who signed it as sureties. Nor can we see that a distinction can be drawn between bonds which are simply joint, and those which are joint and several, as was that in controversy. The doctrine upon which all of the cases before referred to are rested will not admit of such a distinction, nor is it suggested in the leading case on the other side cited by counsel for appellant. *Trustees of Schools v. Sheik*, 119 Ill. 579, (8 N. E. Rep. 189.)

This brings us to a consideration of the only remaining point. It was remarked in the *Austin Case* that "it may be that persons executing such an instrument, which, upon its face, appears to be incomplete, may, by their own conduct, subject themselves to liability thereon, or become estopped from questioning the completeness of the instrument."

Of course, no one can doubt that if sureties see fit to bind themselves absolutely, in any manner, without the signature of the principal, although named as such in the bond, they may do so, precisely as sureties may bind themselves although one of their number named as such in the obligation has refused to sign it, as was the case in *Van Norman v. Barbeau*, 54 Minn. 388, (55 N. W. Rep. 1112.) So we now have to inquire whether, by their conduct, these sureties have in any way concluded themselves from denying a liability upon the instrument which they signed. From the evidence, it appears that a printed note of instructions was appended to the blank bond. By this, the applicant for appointment was informed that the bond must be signed by himself as principal, with at least two sureties. Hornsby was a real-estate dealer, and requested Lamprey and Clark to become sureties upon the bond in question, informing each that the other had agreed so to do. At his request, Clark went to Lamprey's office, where the blank was. Clark there wrote, in the body

of the bond, the three names "A. H. Hornsby," "U. L. Lamprey," and "Chas. W. Clark," as they appear in the first quotation herein. Hornsby was not present. Clark signed the instrument in the presence of a notary public then in Lamprey's employ, and went away, leaving it with the notary. Shortly before or after this, Lamprey signed the bond in the presence of Hornsby and the notary, at the same time calling Hornsby's attention to the requirements, as contained in the appended note; stating to him that he must sign it as principal, and that without his signature it would be worthless. Lamprey, being called away, immediately left his office. Both of these sureties expected that the bond would be signed by Hornsby as principal, and to some extent relied upon their knowledge of the custom respecting such bonds, and the manner in which they were usually required to be executed. They knew nothing of a delivery of this instrument, nor did they know of its incomplete and unfinished condition until after the transaction out of which came this litigation. On these facts, we are unable to see how the sureties have precluded themselves from asserting the invalidity of the obligation. There was no conduct on their part which should prevent them from taking advantage of the incompleteness of the bond, or which should estop them from insisting that there was no contract on which they are liable.

It is the admitted fact that both of these sureties had more or less knowledge, later on, that Hornsby was acting as a notary public, but, as before stated, they were not informed of his delivery of the bond without having signed it as principal. Had they been so informed, and then allowed him to exercise the duties of a notary, it is possible that they might not have escaped the consequences of his misconduct.

We think it manifest, from the whole case, that the sureties did not intend to be bound on the instrument unless it was also executed by the principal named therein, nor was it the intention of the chief executive of the state to accept it without such execution, and, further, that the sureties have not precluded nor estopped themselves from taking advantage of the omission.

**Order affirmed.**

(Opinion published 56 N. W. Rep. 751.)

**Application for reargument denied November 21, 1898.**

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56	192
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AMANDA V. GREEN *vs.* ST. PAUL, MINNEAPOLIS & MANITOBA RY. CO.

EMILY F. ARNOLD *vs.* SAME.

Argued Oct. 19, 1893. Affirmed Nov. 8, 1893.

Nos. 8304, 8483.

**Evidence considered.**

*Held*, that the evidence in these cases, which were tried and submitted together, was not so manifestly and palpably in favor of the verdicts as to justify this court in reversing the order of the court below setting them aside and granting new trials.

Appeal by plaintiff, Amanda V. Green, from an order of the District Court of Sherburne County, *L. L. Baxter*, J., made June 24, 1891, granting the motion of the defendant, the St. Paul, Minneapolis and Manitoba Railway Company, for a new trial.

On July 16, 1889, plaintiff's horse was running at large in the Township of Livonia and went onto the track of defendant's railroad at the station at Zimmerman and ran north about sixty rods along the track to a cattle guard. It jumped this cattle guard and ran along the track about one hundred and twenty five rods further, to a trestle bridge over a swale forty feet long and eight feet above the ground. There it was struck by an engine going north and thrown off on the west side and killed. This cattle guard was six feet four inches wide. This action was to recover the value of the horse. The only negligence alleged in the complaint was, that the Railway Company failed to build and maintain a good and sufficient cattle guard at the point where the horse jumped it. Plaintiff had a verdict for \$157. On motion of defendant, the Court set it aside, saying the evidence was not sufficient to sustain the charge of negligence. From this order plaintiff appeals.

Emily F. Arnold had a mare and two colts at large with Mrs. Green's horse. They also went onto the track at the same time and place and ran north with the horse, jumped the cattle guard and were injured or killed at the bridge. She brought a similar action and had a verdict which the Court set aside and she also appeals. Both appeals involved the same question and were argued together in this Court.

*I. W. Arnold, Edward Savage and Savage & Purdy, for appellants.*  
*M. D. Grover and Geo. H. Reynolds, for respondent.*

COLLINS, J. These were stock-killing cases, growing out of the same occurrence, and tried together, separate verdicts being rendered against the defendant in each case. Its motion for a new trial being granted, plaintiffs appealed. It is quite evident that in granting new trials the court below, although influenced, perhaps, by other reasons, was of the opinion that the evidence was insufficient to sustain the charge of negligence on the part of defendant. We do not hesitate in saying that the court below was right in this, on the theory upon which these cases appear to have been submitted to the jury. It seems to have been assumed that defendant's liability arose and existed, if at all, out of its failure to keep clear of weeds, and in proper condition, a cattle guard at a point in its railway some sixty rods distant from where the horses entered upon the right of way and railway track. The animals, evidently frightened, jumped this guard as they ran along the track. The plaintiffs claimed (so the court below charged the jury) that defendant had failed to maintain the guard in proper condition, and that this was negligence for which it should respond in damages. It also charged that there was no other evidence of defendant's carelessness or negligence. It further charged that if this guard was in proper condition and was such as defendant was required to maintain, the plaintiffs could not recover. To these several statements to the jury the plaintiffs took no exceptions, nor did they request anything further or different from the court respecting defendant's alleged negligence. For the purposes of this appeal, plaintiffs must abide by the theory upon which their counsel seems to have finally rested the cases, and also by the charge of the court, which they acquiesced in, and evidently approved. They cannot now shift position, and urge that, as defendant's negligence really consisted in its failure to fence the right of way, the court below erred when granting new trials on the principal ground before mentioned.

As we must assume that the charge was correct, as a matter of law, it would be incumbent upon us, in order to reverse the order appealed from, to declare that the evidence was manifestly and pal-  
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pably in favor of the verdicts. This cannot be done, for, on the theory upon which plaintiffs undertook to recover, there was really very little testimony on which to base verdicts for plaintiffs. No complaint was made that the cattle guard was improperly constructed, or had become out of repair, or insufficient to turn animals under ordinary circumstances. To be sure, there was testimony tending to show that a few weeds had grown up from the bottom, and a little sand had accumulated there; but these facts were of no importance, because the proof was clear that the animals jumped the guard, and, of course, the weeds and sand cut no figure.

In view of new trials, it is advisable for us to say that, under the circumstances disclosed by the testimony, the bare fact that the horses were unlawfully running at large did not constitute their owners wrongdoers as to defendant company, nor was it contributory negligence *per se* on the part of such owners. *Johnson v. Milwaukee & St. P. Ry. Co.*, 29 Minn. 425, (13 N. W. Rep. 673;) *Watier v. Chicago, St. P., M. & O. Ry. Co.*, 31 Minn. 91, (16 N. W. Rep. 537.) The question of contributory negligence, on the facts shown, was for the jury. The difference between the cases at bar and that of *Moser v. St. Paul & D. R. Co.*, 42 Minn. 480, (44 N. W. Rep. 530,) can easily be seen by an examination of the circumstances attending each.

The trial court very properly declined to charge the jury as requested by defendant's counsel, for all of their requests involved the proposition that, at law, plaintiffs were guilty of contributory negligence when allowing their horses to unlawfully run at large; the persons in charge thereof having knowledge that at a point two and a half miles distant defendant's right of way was unfenced. The facts did not warrant any such proposition.

We remark, in conclusion, that whether the neglect of defendant to fence that part of its right of way south of the cattle guard, and where the animals first went upon the track, was the proximate cause of the injury occurring after they had jumped the cattle guard, and gotten upon a part of the railway which was inclosed with a fence, assuming the guard, which was part of the fence, was "good and sufficient," is a question which we do not now consider, as counsel have neither raised nor discussed it. All we care to say in ref-

erence to it is that it is not necessarily controlled by *Cox v. Minneapolis, S. Ste. M. & A. Ry. Co.*, 41 Minn. 101, (42 N. W. Rep. 924.)

Order affirmed.

(Opinion published 56 N. W. Rep. 752.)

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JAMES FITZPATRICK *vs.* ERIC HANSON.

Argued Oct. 25, 1893. Affirmed Nov. 8, 1893.

No. 8519.

**Burden of proof of good faith of chattel mortgage.**

As against a landlord, who, with the consent of the tenant, has canceled a lease held by the latter to carry on a farm "upon shares," and has in good faith purchased and paid for all rights or interests which the tenant may have had in a crop of grain then growing, or to be grown at that season, upon the premises, it is incumbent upon one who claims title to a share of such grain under and by virtue of a chattel mortgage executed and delivered by the tenant before the seed was sown from which such grain was raised to show that said mortgage was executed in good faith, and not for the purpose of defrauding creditors.

**A mortgagee of chattels with notice of a prior sale of them made to defraud creditors cannot contest the sale on that ground.**

One who takes a mortgage upon an undivided share of a crop growing on the farm of a third person, relying upon and in the belief that a secret agreement, made for the purpose of defrauding the mortgagor's creditors, exists between said third party and such mortgagor, to the effect that the latter, apparently a laborer upon the farm of the former, is in fact a tenant cultivating the farm upon shares, cannot claim the benefit of such secret and fraudulent agreement.

**The purchaser held not estopped by his statements.**

*Held*, that such third party was not estopped from asserting title to the entire crop of grain by reason of certain statements alleged to have been made by him to the plaintiff mortgagee.

Appeal by plaintiff, James Fitzpatrick, from an order of the District Court of Steele County, *Thomas S. Buckham, J.*, made March 25, 1893, denying his motion for a new trial.

The defendant, Eric Hanson, owned a farm in Dodge County and in the fall of 1890 leased it to Ferdinand Kimple for five years and



was to furnish seed and have as rent one half of the crops raised thereon. On November 11, 1891, Kimple mortgaged to Geo. B. Arnold his share of the crops to be raised on the farm in 1892 to secure the payment of his note to Arnold for \$246 and interest due thirty days after that date. On August 24, 1892, Arnold sold and assigned this note and mortgage to the plaintiff. On August 26, 1892, Kimple mortgaged to plaintiff his share of the crops raised on the farm that year to secure the payment of his note to plaintiff for \$300 given for the same Arnold debt and due on demand. In April, 1892, Kimple and Hanson had a settlement and the lease was surrendered and Kimple made a bill of sale to Hanson of all his interest and agreed to work for Hanson on the farm that coming summer for wages. Kimple testified that this was done to prevent his creditors seizing his half of the crops, but that he and Hanson had a secret understanding that Hanson should give him a half of the crop in the fall instead of wages, that Fitzpatrick knew of this secret understanding before he bought the Arnold mortgage and before he took the other mortgage in renewal of it, and that he heard Hanson admit it to Fitzpatrick before. Early in September, 1892, Hanson settled with Kimple and paid him \$75 for his services and he accepted it in full and removed from the farm. On September 29, 1892, Fitzpatrick demanded of Hanson a half of the crop raised that year and being refused brought this action to recover the value. The venue was changed to Steele County. At the trial plaintiff omitted to prove the consideration or good faith of the mortgages and the Court directed a verdict for defendant. Plaintiff excepted, moved for a new trial and being denied appeals and claims that Hanson was a subsequent purchaser of this half of the crop and did not show that he purchased in good faith. 1878 G. S. ch. 39, § 1.

*S. T. Littleton, for appellant.*

*Sawyer & Sawyer, for respondent.*

**COLLINS, J.** The plaintiff in this action claimed title to the grain in controversy, which was raised on defendant's farm in 1892, through two chattel mortgages executed and delivered by one Kimple. One of these mortgages bore date November 11, 1891, was executed to George B. Arnold, and by him assigned to the plaintiff August 24, 1892, more than six months after the note therein de-

scribed, and thereby secured, had matured. It covered, among other property, an undivided half of the grain to be raised by said Kimple on defendant's farm in the season of 1892. The other mortgage bore date August 26, 1892, ran to plaintiff as mortgagee, and was upon the same grain, (Kimple's share of the grain raised on defendant's farm in the year 1892,) as well as other property.

Both mortgages were duly filed. From the proofs, it appeared that, in the spring of 1891, defendant, in writing, leased his farm to Kimple. This lease was not produced in evidence, nor were its terms and conditions disclosed, except that it was for five years, the defendant could annul it if Kimple's conduct as a tenant was unsatisfactory, and the products were to be equally divided. Early in April, 1892, defendant being dissatisfied with Kimple, the lease was canceled, the latter consenting. Subsequently, a new agreement was made, whereby Kimple was to remain upon the farm as a laborer, to be paid what his services were worth. Difficulties arising, which led to litigation between the parties, a settlement was had between them in the month of September. Kimple was paid a small balance due, receipted for all claims upon defendant and upon the farm products, and removed from the premises, a short time prior to the commencement of this action.

There was received in evidence, to sustain plaintiff's claim of title, copies of the Arnold mortgage, and of the assignment, duly certified to by the town clerk. No other testimony whatever was offered or received relating to the mortgage, or the debt or note thereby secured, except that plaintiff testified that \$60, only, had been paid upon both mortgages. As has been stated the note matured long before the seed was sown from which came the grain, and long prior to the time of the assignment of the mortgage to plaintiff. This note was not produced on the trial, nor was its absence accounted for, nor was it shown that plaintiff ever had it in his possession. No further or other attempt was made, by or through the Arnold mortgage, to establish plaintiff's claim upon or title to the grain raised upon defendant's farm, and in his possession when this action was commenced. Upon these proofs, alone, the plaintiff was not entitled to recover. If the defendant had the power, as against the existing mortgage, to cancel and terminate the lease at the time it was canceled and terminated, in April, 1892, Kimple

had no further interest in the grain to be raised that year; or, if Kimple then had an interest in the grain, which defendant could not extinguish by Kimple's consent or otherwise, it passed to the former, as a bona fide purchaser, when settlement was made in September of that year. If this was the situation, defendant must be regarded as a bona fide purchaser, and it was incumbent upon plaintiff to show, at least, that the Arnold mortgage was executed in good faith, and not for the purpose of defrauding Kimple's creditors.

The lease had been canceled several months before the second mortgage was executed. This mortgage was taken by plaintiff, and also the assignment of the Arnold mortgage, after he had been informed, as he claimed, of a secret agreement, made for the purpose of defrauding Kimple's creditors, which existed between Kimple and defendant, to the effect that, although the former was apparently a laborer on the farm, he was actually a tenant, carrying on the place upon the terms and conditions found in the lease; the plaintiff relying, when he took the mortgage, upon his right to claim the benefit of such secret and fraudulent agreement. A creditor might have obtained the benefit of such an agreement, but Kimple, mortgagor, could not, nor could plaintiff mortgagee, in privity with him.

It was shown upon the trial that defendant had made certain statements to plaintiff relative to this secret agreement before the execution of the second mortgage.

It was not shown that these statements were made to mislead the plaintiff, or made with any improper intent, or that defendant had any knowledge that plaintiff contemplated the taking of a mortgage, or was otherwise interested in learning what Kimple's rights or interests were in the farm or its products, nor was it shown that by any of these statements was plaintiff induced to take the mortgage. Not a single element of estoppel can be claimed upon this branch of the case.

Order affirmed.

(Opinion published 56 N. W. Rep. 814.)

## EMMA HOLM vs. VILLAGE OF CARVER.

Argued by appellant, submitted on brief by respondent, Oct. 26, 1893. Affirmed Nov. 13, 1893.

No. 7836.

**Charge to the jury.**

The refusal of special requests to charge the jury is not error where the substance of them has been already given in the general charge.

**Charge as to contributory negligence construed.**

A certain instruction considered, and *held* that, in the light of the entire charge, it could not have been understood as meaning that plaintiff might recover notwithstanding some degree of contributory negligence on her part.

Appeal by defendant, the Village of Carver, from an order of the District Court of Carver County, *Francis Cadwell, J.*, made July 1, 1892, denying its motion for a new trial.

On the west side of the street called Broadway in the Village of Carver was a sidewalk made of pine plank. On June 30, 1891, the plaintiff, Emma Holm, while going along this sidewalk carrying a house lamp stepped upon a loose plank in the walk and was thrown down and her right knee was injured. She brought this action to recover damages for this personal injury. The defendant answered, that the place where the accident occurred was in the outskirts of the village where sidewalks had never been authorized, that this short piece of walk was built and maintained by the owner of the abutting lot for his own convenience, that defendant had no notice of any defect in the walk and that plaintiff lived in the immediate vicinity and was accustomed to travel over it nearly every day and knew of the defect in the walk and her injury was caused by her own negligence, in going carelessly over the walk which she knew to be old and out of repair.

The issues were tried March 25, 1892. The defendant requested the Judge to charge the jury as follows:

8th. If the plaintiff was familiar with the sidewalk at the place where the accident occurred and it was out of order, there is strong probability that she must have known there were loose planks there, and it became her duty to be careful and prudent, in view of the knowledge which she had.

9th. If the jury find that the plaintiff was familiar with the walk in question and its condition and passed over it daily, it was her duty, if it was out of order, to take more than ordinary care in passing over it on the day she received the injury complained of, and it was her duty to be more vigilant if she knew of the defect than if she had been ignorant of the fact that it was out of condition.

The Judge refused to give these requests, but in his charge to the jury said:

If that sidewalk was built by a private individual on the street without authority of the Village Council, nevertheless, after it was built and the Village Council suffered and allowed it to remain in the street, it was the duty of the village to keep it in safe repair and in proper condition for travel. To recover, the plaintiff must prove that she was injured without any fault or neglect on her part. It is the duty of persons who have occasion to use the sidewalk to use ordinary caution and care; and if they do not do that, they contribute to the injuries they receive. If you find that the injuries she received were the consequence of her own fault, although the village was negligent and had not performed its duty, still she cannot recover. The defendant is bound by law to use all reasonable care, caution and supervision to keep its streets and sidewalks in a safe condition for travel in the ordinary modes for traveling, and if it fails to do so it is liable for injuries sustained in consequence of such failure, provided the party injured is herself exercising reasonable care and caution; and the fact that the plaintiff may in some way have contributed to the injury sustained by her, will not prevent her recovery if by ordinary care she could not have avoided the consequences to herself of the defendant's negligence.

If you believe from the evidence that the place where the accident to the plaintiff occurred was in a dangerous condition and such dangerous condition of the sidewalk in question was known to the plaintiff, then the plaintiff was required to use more than ordinary care and caution to avoid the accident, and if she failed to do so and thereby contributed to the injury, she cannot recover in this action.

If you find that the sidewalk was dangerous and so known to be, by the plaintiff, it was her duty in passing over and along it to use more than ordinary care and caution to avoid injury, and if she

failed so to do she was guilty of contributory negligence and cannot recover in this action.

The defendant duly excepted to each of these refusals to charge and to these parts of the charge. The jury returned a verdict for plaintiff and assessed her damages at \$1,000. The defendant moved for a new trial. Being denied it appeals.

*Frank Warner and Southworth & Collier, for appellant.*

*W. C. Odell and H. J. Peck, for respondent.*

**MITCHELL, J.** Action to recover for personal injuries caused by the defendant's neglect to keep a sidewalk in safe condition for public travel.

An examination of the record satisfies us that upon the question of defendant's negligence the evidence made a fair case for the jury, and that upon the question of plaintiff's contributory negligence the most that could be claimed in behalf of the defendant was that the evidence also made a case for the jury.

There was no error in the court's refusal to give the requested instructions numbered eighth and ninth, for the reason that they were substantially given in the general charge.

The only thing in the record that raises even a serious suggestion of error is the remark of the court in its general charge that "the fact that the plaintiff may in some way have contributed to the injury would not prevent her recovery if by ordinary care she could not have avoided the consequences to herself of defendant's negligence." That the court did not mean that plaintiff might recover notwithstanding that her own negligence contributed to the injury is clearly indicated by the last clause of the instruction itself. Although, perhaps, not very fortunately expressed, what the court evidently meant was that the mere fact that plaintiff contributed to the injury would not prevent her recovery, unless the contributory acts were negligent.

Probably the court had in mind the fact that plaintiff had previous knowledge that the sidewalk was out of repair, or possibly the fact that at the time of the accident she was carrying some articles in her hands or arms which made her more liable to fall when her foot went down through the broken plank.

Standing alone, the instruction might have been somewhat misleading, but, in view of the entire charge, it could not have been understood by the jury as meaning that plaintiff might recover notwithstanding some degree of contributory negligence. The court repeatedly and explicitly instructed the jury that to entitle her to recover she herself must have been in the exercise of reasonable care and caution, and had clearly defined what constituted reasonable care; also that if plaintiff knew that the sidewalk was in a dangerous condition it was her duty, in passing over it, to use more than ordinary care and caution to avoid injury, and, if she failed to do so, she was guilty of contributory negligence, and could not recover. The other assignments of error are not of sufficient importance to require special notice.

Order affirmed.

(Opinion published 56 N. W. Rep. 826.)

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**ELIZABETH PFEFFERLE *et al.* vs. CHRISTIAN WIELAND *et al.***

Argued by appellant, submitted on brief by respondent, Oct. 18, 1898. Reversed Nov. 18, 1898.

No. 8444.

**Lien of a purchaser at a tax sale for subsequent taxes paid.**

The provisions of Laws 1874, ch. 2, § 28, giving a purchaser at tax sale a lien for taxes paid after the sale, apply only to cases where the sale is declared void by reason of "something occurring or omitted subsequent to the entry of the judgment directing the sale."

**State assignment certificate is an official deed.**

A certificate of the county auditor, executed under section 19 of the act referred to, assigning the right of the state to lands bid in at the sale, is "an official deed," within the meaning of the occupying claimant act, (1878 G. S. ch. 75, § 15.)

**Same—Failure to state subsequent taxes paid does not render it void.**

The fact that such certificate does not recite that the purchaser has also paid "the amount of any subsequent taxes" on the land does not render it void or irregular on its face.

**Findings justified by the evidence.**

Evidence *add* to justify a finding that defendants had no "actual notice" of any defect invalidating the certificate.

**Case remanded.**

Cause remanded for additional findings, and modification of the conclusions of law.

Appeal by plaintiffs, Elizabeth Pfefferle and Richard Pfefferle her husband, from an order of the District Court of Brown County, *B. F. Webber, J.*, made January 28, 1893, denying their motion for a new trial.

On October 12, 1874, in proceedings to enforce the payment of delinquent taxes for the year 1872 judgment was entered in the District Court under Laws 1874, ch. 2, against the west one fourth of section four (4) in Township 109 Range 31 on the Cottonwood River in Brown County for \$34.37. The land was sold December 31, 1874, by the County Auditor under this judgment and was bid in for the State for \$36.63 and a certificate of the sale issued. No copy of the resolution of the Board of County Commissioners of that county designating a newspaper in which the delinquent list and notice should be published was ever filed in the office of the clerk of that court and the judgment was for that reason void. On December 28, 1876, Peter Manderfeld paid \$51.22 into the County Treasury and the Auditor sold to him the right of the State in and to the land and gave him an assignment in the form prescribed by Laws 1874, ch. 2, § 19, which certificate was on the next day recorded in the Registry of Deeds of Brown County. On August 25, 1877, Manderfeld assigned this certificate to Henry Mueller and he at various times afterwards paid taxes on the land for subsequent years to the amount of \$304.44. On May 20, 1886, Henry Mueller and wife sold and quitclaimed to their son, Martin Mueller the north half of the land and he went into possession thereof and at various times thereafter paid subsequent taxes on that eighty acres to the amount of \$44.88. He built a house, barn, granary and fence thereon in good faith valued at \$811. The yearly value of the rent of this eighty acres after he took possession in 1886 was \$125. He rented this eighty acres to the defendant, Christian Wieland. The title of the whole one hundred and sixty acres derived from the United States was held by the plaintiff, Elizabeth Pfefferle. She and her



husband brought this action of ejectment against Wieland the tenant, alleging that he was in possession of the whole one hundred and sixty acres and demanding judgment for the recovery of the possession and \$500 damages for the withholding thereof. Henry Mueller and Martin Mueller each intervened and by their answers alleged that they had an interest in the matter in litigation and united with the defendant Wieland in resisting the claim of the plaintiffs. They severally set forth in their answers the facts above stated and asked that plaintiffs be required to pay into Court for them the value of the improvements and the amount paid for taxes on the land with interest, less the value of the rent of the eighty acres without the improvements, while occupied by the son. (1878 G. S. ch. 75, §§ 15, 16, 17.)

The issues were tried September 19, 1892, before the Court without a jury. Findings of these facts were made and judgment ordered that Elizabeth Pfefferle owned the land, that Henry Mueller had a lien on the south half for \$554.91 for taxes paid by him thereon and interest, that Martin Mueller had a lien on the north half for \$486.03 for taxes paid thereon by him and his father and for \$63.89 the balance of the value of his improvements after deducting the value of the yearly rent, that plaintiffs pay these sums with interest within one year and in default thereof that their title be forfeited to the intervenors and that on such payment the plaintiffs recover possession.

The plaintiffs moved for a new trial and being denied they appeal.

*Lind & Hagberg*, for appellants.

The tax judgment sale was void for want of jurisdiction in the Court to render judgment. The sale of the land to the State was therefore a nullity, and so was the attempted assignment from the state to Peter Manderfield. This assignment certificate was void on its face because no judgment had been shown. If admissible in evidence at all, it could only be received for the purpose of establishing a lien on the land for taxes paid under the occupying claimant's act, but for this purpose it was inadmissible as it was void on its face. The assignment from the State to Manderfield was made two years after the sale. But he did not pay the subsequent taxes. The assignment shows this on its face. We contend

that the payment of these subsequent taxes was a condition precedent without which the County Auditor had no power to issue an assignment. The recital of the payment of subsequent taxes is contained in the form of assignment given in the act itself. Laws 1874, ch. 2, § 19. It was a jurisdictional prerequisite which could not be omitted. A failure to recite this in the certificate makes the latter void on its face. *Cogle v. Raph*, 24 Minn. 194; *Gilfillan v. Chatterton*, 38 Minn. 335; *Greve v. Coffin*, 14 Minn. 345; *O'Mulcahy v. Florer*, 27 Minn. 449.

The intervenors had no lien under Laws 1874, ch. 2, § 28, for the taxes paid with interest. They do not claim it in their answers. They claim under the occupying claimants' act and must abide their choice. *Taylor v. Slingerland*, 39 Minn. 470; *Dawson v. Girard*, 27 Minn. 411.

It is competent for the Legislature in proper cases to subrogate a party who has paid taxes to the lien of the state and to enforce that lien even though the certificate under which he claims his right of subrogation should be void. But this right does not exist unless it is conferred by the statute. *Burdick v. Bingham*, 38 Minn. 482.

Laws 1874, ch. 2, § 18, provides that the purchaser or assignee of the State at a sale declared void by reason of anything occurring or omitted subsequent to the entry of judgment, has a right to be refunded from the county and by the proviso such purchaser or assignee has a lien for taxes subsequently paid. This sale was not declared void by reason of anything done or omitted subsequent to the entry of judgment. It was declared void because there was no judgment. *Barber v. Evans*, 27 Minn. 92.

The construction we contend for, works no injustice. If the tax title claimant's deed is regular on its face, the occupying claimants' act protects him. If the sale is void and there is a valid judgment, he can recover back his money from the county. If there is neither a valid sale nor a valid judgment we can conceive of no theory upon which a lien could be created against the land.

The Court erred in allowing interest at the rate of two per cent. per month. Interest is allowed by § 28 "at the rate by this act allowed." Now, there is interest allowed at two different rates in the act, one by § 28 at twelve per cent. a year to be paid by the county on void tax sales, and the other by § 29 at two per cent. a

month upon judgments rendered pursuant to this act. The amount for which a parcel is sold or bid in, bears interest at the same rate from the date of sale. All subsequent taxes paid by the purchaser or any assignee bear interest at this rate. The provisions of § 29 relate wholly to valid tax judgments and valid sales and assignments. The statute fixes twelve per cent. as the rate in one class of invalid sales, but not in all. The rate claimed in the answer is seven per cent. under the occupying claimants' act.

That an occupying claimant should have compensation, or rather that he could offset the value of permanent improvements made in good faith under the belief that he was the true owner against a claim for mesne profits is as old as the equity jurisprudence of England. The occupying claimants' act introduced no new principle in our law. It only extended the claimant's remedy by giving him a lien on the land for all improvements, and an affirmative judgment if it exceeded the plaintiff's claim for mesne profits. The rule of equity was that the exemption of an occupant from an account for profits to the extent of lasting improvements made by him is strictly confined to a *bona fide* possessor, who not only supposes himself to be the true proprietor of the land, but who is ignorant of the adverse claim. This we believe to be the spirit of the act of our Legislature. We do not believe that the occupant can blindly shut his eyes and ears to claims that are communicated to him adverse to his title and contentedly say, "My title is good. I am satisfied." We do not believe that foolhardy indifference on his part to facts that would put an ordinarily prudent man on his inquiry, will be held to be good faith. The term "good faith" in this statute must be construed as it is generally used and understood in our laws. Blind, heedless faith, is not good faith. 2 Pomeroy, Eq. J. § 597; *Pringle v. Dunn*, 37 Wis. 449; *Brinkmann v. Jones*, 44 Wis. 498; *Chadbourn v. Williams*, 45 Minn. 294; *Bailey v. Galpin*, 40 Minn. 319; *Jewell v. Thurn*, 38 Minn. 483.

*Joseph A. Eckstein and A. A. Stone*, for respondents.

Laws 1874, ch. 2, § 28, deals with all void sales made under that act. Its proviso deals with any purchaser at any void sale or his assignee or party holding his right, giving to any such purchaser at any void sale, his assignee or party holding his right, a lien upon

the land for all taxes paid subsequent to such purchase; and the fact that provision is made for the repayment by the county to the purchaser of the purchase price with interest paid at sale void for a certain specified and limited class of cases cannot change its effect.

The rate of interest fixed and allowed by the act for subsequent taxes paid, is two per cent. per month. Section 28 does not specify the rate of interest upon these payments otherwise than by reference to the rate fixed by the act. Such rate is fixed in § 29 and not elsewhere and it is there fixed at two per cent. per month. The intervenors hold the right of the assignee of the State and have paid subsequent taxes. This right extends to all cases of void sales. It was stipulated on the trial, to facilitate the determination of the intervenors' rights, that the intervenors are in possession by their tenant of all the land in controversy. Being in possession holding the right of the assignee of the State under a tax sale adjudged to be void and having paid the alleged taxes, they cannot be ejected without first being repaid such taxes, with interest from the date of their respective payments at the rate of two per cent. per month.

The evidence we think establishes the fact that Martin Mueller is a "good faith" purchaser, that his entry upon the land claimed by him was peaceable and under color of title in fee and that his improvements were made and the taxes paid prior to any notice, actual or otherwise, of the plaintiff's claim, or of any defects invalidating his title, and he is entitled to recover the taxes so paid and interest and the value of his improvements less the value of the yearly rental.

However defective the proceedings may have been under which this land was sold at this tax sale, the certificate issued to the State, and the assignment to Manderfield are official deeds and regular on their face. *Madland v. Benland*, 24 Minn. 372.

The assignment to Henry Mueller endorsed as it is on the official certificate has all the effect of a quitclaim deed. It purports to convey the interest in the land acquired at the sale for delinquent taxes. *Wheeler v. Merriman*, 30 Minn. 372; *Seigneuret v. Fahey*, 27 Minn. 60.

If the intervenors are not entitled to recover under Laws 1874, ch. 2, and are entitled to recover under 1878 G. S. ch. 75, §§ 16, 17,

then interest should be allowed at the rate of seven per cent. to the date of the Court's decision and no interest should be allowed thereafter.

MITCHELL, J. The land in controversy (160 acres) belonged to one Laudenschlager, and has been sold, under Laws 1874, ch. 2, for taxes delinquent in and prior to 1873, bid in for the state, and the right of the state assigned to one Manderfeld, who subsequently assigned the certificate, for value, to the intervener Henry Mueller. The land not having been redeemed, Mueller went into possession, and subsequently conveyed one eighty to his son, the intervener Martin Mueller, who went into possession under his deed. Plaintiffs, the successors in interest of Laudenschlager, having brought this action to recover possession of the land against defendant, Wieland, the tenant of the Muellers, the latter intervened, alleging title in themselves under the tax title referred to, but also asking that, if it should be adjudged that plaintiffs were the owners, they be required to pay into court, within one year, the value of the improvements made and taxes paid by them during their occupancy, with seven per cent. interest, less the value of the rents and profits.

It is undisputed that plaintiffs are the owners of the land, the tax title under which interveners claimed being void because there was no valid judgment authorizing the sale. The court below sustained this claim as to both interveners, and allowed them interest on the amount of the taxes paid by them, at the rate of two per cent. per month, evidently upon the theory that the provisions of Laws 1874, ch. 2, § 28, already cited, applied.

Upon this appeal the intervenors contend that the decision of the trial court is sustainable (1) under the provisions of the act of 1874; (2) under the "occupying claimant act," (1878 G. S. ch. 75, § 15, et seq.)

The first position is untenable for two reasons: *First*, they do not set up any such claim in their pleadings, which were evidently framed exclusively with reference to relief under the occupying claimant act. There is nothing in the pleadings even suggestive of a claim of lien under the act of 1874, and nothing in the record to indicate that the case was tried on any such theory. It is not enough that somewhere there may be found all the allegations of fact necessary in an action to enforce a lien under the act of 1874.

Having framed their pleadings upon the theory of setting up a claim under one statute, they cannot be permitted to recover on another claim, under another statute, where both the measure of relief and the line of proof might be different. See *Walton v. Perkins*, 28 Minn. 413, (10 N. W. Rep. 424.) But, *second*, Laws 1874, ch. 2, § 28, applies only to cases where the sale is declared void by reason of "something occurring or omitted *subsequent* to the entry of the judgment directing the sale." There may have been good reasons for the legislature thus limiting the provision of the law; but, whether there were or not, it is enough that they have done so. And, the right to a lien being purely the creature of statute, it cannot be extended to cases not falling within its provisions. Therefore, the rights, if any, of the interveners, rest exclusively upon the provisions of the occupying claimant law. This will render necessary at least a modification of the decision of the trial judge, for the reason that the statute last referred to only allows the occupant interest at seven per cent. per annum on the amount of taxes paid by him. It will also render it necessary to remand the case for further proceedings, for the reason that, as to Henry Mueller, the court has made no findings of fact, upon which any judgment in his favor, under the occupying claimant law, could be rendered.

This brings us to the question whether the parties have brought themselves within the provisions of this statute. A careful examination of the first section of the act of 1873 (1878 G. S. ch. 75, § 15) will show that it provides for two classes of occupants, to wit: *First*. Those who "under color of title and in good faith have peacefully taken possession," etc. *Second*. Those who have "taken possession of any land under the official deed of any person or officer empowered by law \* \* \* to sell land," etc. The first class may be defined as those who go into possession of land under color of what may be termed "private or unofficial title;" and the second class, those who go into possession under color of what may be called "official title."

Of course, heirs, representatives, or assignees stand on the same footing as the original occupant. In the case of the first class, the person must have taken possession "in good faith." What will constitute good faith, or the want of it, within the meaning of such

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statutes, is a question upon which there is not entire harmony of views among the courts, as, for example, whether knowledge of the existence of an adverse claim to the land is necessarily, under all circumstances, conclusive against the good faith of the occupant; also, as to whether notice of facts sufficient to put a prudent man upon inquiry, which, if followed up with reasonable diligence, would have led to a discovery of the defective character of the title, will deprive a person of the character of good-faith occupant, or whether the term "good faith" is to be given its original and popular meaning of honesty of purpose,—absence of bad faith.

The second class (those entering under an official deed) seem to be placed by the statute on a somewhat different and more secure footing, probably for the purpose of encouraging purchasers at official sales. All that is required, in such case, is that the deed be regular on its face, and that the person "has no *actual* notice of any defects invalidating such deed," which would be presumed, in the absence of evidence to the contrary. The idea of the statute seems to be to place the contemplated purchaser in a position where he may safely buy in reliance upon its provisions, without further investigation, provided the official deed is regular on its face, and executed by one who is empowered by law to make such sales, and *provided* he has no actual knowledge of any defects invalidating the deed.

In this case, of course, the deed from Henry to Martin constituted color of title which would bring the latter within the first class, provided he established the other statutory conditions, even although the auditor's certificate was not an official deed, regular on its face. But, if the certificate is such official deed, then, clearly, he is in a position to claim the benefit of the provisions of the statute as to the second class.

There is no evidence that he had any actual notice of any defects invalidating the tax-sale certificate; and hence, whether the evidence was sufficient or not to justify the finding of "good faith," within the meaning of the first clause of the statute, it was sufficient to justify a finding that Martin had no actual notice of any defects invalidating the instrument. That the auditor's certificate of assignment of the state's right is "an official deed," within the meaning of the statute, we have no doubt, and it only remains to

consider whether it is "regular on its face." The only substantial objection urged to its regularity is that it does not recite that the party to whom it was issued had paid "the amount of any subsequent taxes" on the land, as provided by Laws 1874, ch. 2, § 19. We cannot resort to extrinsic evidence, as, for example, whether there were in fact subsequent taxes then due on the land, for the purpose of determining whether the certificate is regular on its face. That must be determined from the face of the instrument itself. If there were no subsequent taxes due on the land, it seems to us that the instrument is in the exact form in which it ought to have been, for the auditor could not truthfully recite that the party paid subsequent taxes, when he had in fact paid none; and, if there were none due, there is nothing in the law requiring the auditor to so state in the certificate. The certificate, being in the form in which, under such circumstances, the auditor might rightfully issue it, is not irregular on its face.

But, for reasons already suggested, the cause is remanded to the court below, with instructions to amend its findings of fact and conclusions of law, or make additional ones, in accordance with this opinion, unless, upon application of either party, the court should, for cause shown, in its judicial discretion, grant a new trial.

(Opinion published 56 N. W. Rep. 824.)

## MERCHANTS' NATIONAL BANK OF CROOKSTON *vs.* ROBERT STANTON *et al.*

Submitted on briefs Oct. 31, 1893. Reversed in part Nov. 13, 1893.

No. 8194.

### Buildings when not fixtures.

Where buildings are erected by one having no interest in the land on which they stand, by the permission or license of the owner of the land, an agreement will be implied (in the absence of any other facts or circumstances tending to show a different intention) that the buildings shall remain the personal property of him who erects them.

### Same—as against a mortgagee of the land.

Where the land is subject to a mortgage, if the agreement of the mortgagor in possession and the party erecting the building was that it should

55	211
57	63
55	211
59	535
55	211
62	306
55	211
77	325
55	211
79	459
55	211
82	490
82	491
55	211
84	808



remain the personal property of the latter, the absence of a concurrent agreement on part of the mortgagee to the same effect will not, of itself, make the building a part of the mortgage security.

**Homestead made primarily liable for a debt secured on it and other land.**

A married man and his wife executed a mortgage on their homestead and other lands, and subsequently united in a conveyance with covenants of warranty of the other lands. *Held*, that the land remaining in the mortgagors, although their homestead, became the primary fund for the payment of the mortgage.

*McArthur v. Martin*, 23 Minn. 74, distinguished.

Appeal by defendants Samuel L. Dobson and Nicholas Martin, from a judgment of the District Court of Polk County, *Ira B. Mills, J.*, entered January 28, 1893.

The plaintiff, the Merchants' National Bank of Crookston, brought this action to foreclose a mortgage given to it on April 14, 1887, by defendants, Robert Stanton and wife, upon lot seven (7) in block twelve (12) in Fletcher & Houston's Addition to Crookston, to secure the payment to it of the note of himself and defendant Dobson of \$5,050 and interest. Stanton bought the lot and took a deed of it that day from Dobson and wife. In 1888 defendant, Samuel L. Dobson, built an oatmeal mill on this lot with Stanton's consent and placed in it suitable machinery for manufacturing oatmeal. Defendant, Nicholas Martin of Chicago, Ill., furnished Dobson \$5,503.33 of the money used to build and equip the mill and Dobson on March 6, 1889, gave him in good faith a chattel mortgage on the mill and machinery to secure repayment of that sum and interest and afterwards gave Martin a bill of sale of the mill and machinery.

There were two prior mortgages on this lot given by Dobson and wife, one to Loren Fletcher and Charles M. Loring September 5, 1881, for \$726. This debt and mortgage were on January 2, 1892, assigned to Martin. The other to Caleb W. Palmer of Troy, N. Y., July 2, 1883, for \$10,500 and interest covering this lot and also lots one (1), two (2), three (3) and four (4) in block seventeen (17) in the original town site of Crookston and a part of lot one (1) in block twelve (12) in Fletcher & Houston's Addition to Crookston and the southwest quarter and the west half of the southeast quarter of section twenty eight (28) in Township one hundred and fifty (150) north

of Range forty six (46) west. On April 26, 1884, Dobson and wife gave to Palmer another mortgage securing the same debt upon lots five (5), six (6), and seven (7) in block one (1) in Loring's Addition to Crookston. This lot seven (7) was Dobson's homestead. This debt and the two mortgages securing it were also assigned to Martin. On June 22, 1887, Dobson and wife sold and conveyed the lots in blocks twelve (12) and seventeen (17) to Francis Reckitt of London, England, with warranty. On November 21, 1890, Dobson and wife sold and conveyed the two hundred and forty acres of land to defendant William A. Cunningham, with warranty. On January 14, 1891, Dobson and wife sold and conveyed the lots in block one (1) in Loring's Addition except lot seven (7) to Grace L. Palmer, with warranty. On April 15, 1884, Palmer released from the lien of his first mortgage the part of lot one (1) in block twelve (12) in Fletcher and Houston's Addition, and on August 15, 1887, he released the lots in block seventeen (17).

The action was tried at Crookston September 6, 1892, before the Court without a jury. By stipulation of the parties the Judge inspected the oatmeal mill to enable him to determine whether it was part of the real estate and covered by the Bank's mortgage. The facts on this point are fully stated in the opinion. Findings were filed December 23, 1892, and among the conclusions of law it was found that the oatmeal mill and its machinery were part of the real estate and embraced in the lien of the mortgage to the Bank and were not subject to the lien of Martin's chattel mortgage. That the Bank was entitled to have Dobson's homestead sold on the second mortgage to Palmer to diminish the prior liens on the lot mortgaged to it and that all the mortgages should be foreclosed.

Judgment was entered accordingly. Martin and Dobson alone appealed. Martin, because his chattel mortgage was held not a lien on the mill and machinery, and Dobson, because his homestead was adjudged to be sold to reduce the Palmer mortgage on the mill lot for the advantage of the mortgage to the Bank.

*A. A. Miller*, for appellants.

Buildings erected on lands of another with the consent of the owner are frequently treated as chattels, and when a chattel has been annexed to another's freehold but may without injury to the

freehold be severed, it does not follow that it becomes a part of the freehold. *Harris v. Frink*, 49 N. Y. 24; *Dame v. Dame*, 38 N. H. 429; *Smith v. Benson*, 1 Hill, 176; *Morris v. French*, 106 Mass. 326; *Curtis v. Kiddle*, 7 Allen, 185; *Doty v. Gorham*, 5 Pick. 487; *Ashmun v. Williams*, 8 Pick. 402; *First Parish in S. v. Jones*, 8 Cush. 190; *Belding v. Cushing*, 1 Gray, 576; *Howard v. Fessenden*, 14 Allen, 124.

When erected by a tenant for purposes of trade and business the agreement for separate ownership and right to remove may be implied from the circumstances of the case and the relations of the parties and usage. *Penton v. Robart*, 2 East, 88; *Taylor v. Townsend*, 8 Mass. 411; *Van Ness v. Pacard*, 2 Pet. 137; *Sudbury v. Jones*, 8 Cush. 184; *Murphy v. Marland*, 8 Cush. 575.

An agreement for the right of removal or that the buildings shall remain as personal property of him who erects them may be implied from the fact that they were erected by permission of the owner of the land. *Hinckley v. Baxter*, 13 Allen, 139; *Osgood v. Howard*, 6 Greenl. 452; *Pullen v. Bell*, 40 Me. 314.

And buildings erected for the purpose of trade or manufacture are removable without reference to their size or the material of which they are constructed. *Van Ness v. Pacard*, 2 Pet. 137; *Lawton v. Lawton*, 3 Atk. 13; *Robertson v. Corsett*, 39 Mich. 777; *Little v. Willford*, 31 Minn. 173; *Stout v. Stoppel*, 30 Minn. 56; *Ingalls v. St. Paul, M. & M. Ry. Co.*, 39 Minn. 479.

The Bank claims that it is entitled to have all the assets covered by all the mortgages marshalled and the proceeds so applied as to leave the proceeds of sale of lot seven (7) to pay its mortgage, if enough be realized from all the other security held by defendant Martin to pay him. This the appellant Dobson denies.

The general rule is that if one creditor by virtue of a lien or interest can resort to two funds and another to one of them only, the former must seek satisfaction out of that fund which the latter cannot touch. This rule must be taken with the modifications and exceptions that in its application the paramount incumbrancer shall not be delayed or inconvenienced in the collection of his debt, that the rights of third parties shall not be prejudiced and that the

parties themselves are creditors of the same debtor. 3 Pomeroy, Eq. J. § 1414; *Ex parte Rendall*, 17 Ves. 514; *Stevens v. Church*, 41 Conn. 369; *Dorr v. Shaw*, 4 Johns. Ch. 17; *Lloyd v. Galbraith* 32 Pa. St. 103; *Sanders v. Cook*, 22 Ind. 436.

A prior incumbrancer holding security upon two tracts, one a homestead, the other not, cannot be compelled by the junior incumbrancer having a lien only on the piece not a homestead, to first resort to the homestead. *McArthur v. Martin*, 23 Minn. 74; *McLaughlin v. Hart*, 46 Cal. 638; *Equitable Life Ins. Co. v. Gleason*, 62 Ia. 277.

*John Cromb and A. C. Wilkinson*, for respondent.

The defendant Martin should be required to exhaust the other securities included in the two mortgages he has bought, before the proceeds of the sale of lot seven (7), the Bank's security, is applied to the payment thereof. The defendant Dobson signed the note to the Bank with Stanton and is the original debtor in each and all of the securities involved herein. The rule contended for by defendants, that the debts must be owing from the same debtor to different creditors, is complied with. Dobson is the debtor in each case. The Bank and Martin are the creditors. As Martin has a lien upon two funds and the Bank a lien upon only one of them, the former will be compelled first to exhaust the subject of his exclusive lien, and will be permitted to resort to the other only for the deficiency. *Franklin v. Warden*, 9 Minn. 124; *Evertson v. Booth*, 19 John. 486.

The Bank has the right to have the homestead of Dobson sold and the proceeds applied in payment of Martin's mortgage thereon before selling lot seven (7), block twelve (12), mortgaged to it. This is simply enforcing an agreement made by the defendant Dobson and wife for a valid consideration that they will use the homestead property to secure the payment of that debt. *Miller v. McCarty*, 47 Minn. 321.

The power of a Court to compel a mortgagee to resort in the first instance to one of several estates mortgaged is exercised only for the protection of equities of different creditors or incumbrancers or of sureties, and never for the benefit of the mortgagor. The fact that the first mortgage is on exempt as well as nonexempt property, and the second mortgage on the nonexempt only, does not change the

rule, that a person having a right to resort to two funds in one of which alone another person has a junior lien shall be compelled to first exhaust the fund to which the other cannot resort. *Searle v. Chapman*, 121 Mass. 19; *Jones v. Dow*, 18 Wis. 241; *White v. Polleys*, 20 Wis. 503; *Chapman v. Lester*, 12 Kans. 592; *Plain v. Roth*, 107 Ill. 588; *Webster v. Bronston*, 5 Bush, 521; *State Savings Bank v. Harbin*, 18 S. C. 425; *Hallman v. Hallman*, 124 Pa. St. 347.

In some states it is held that as the mortgage of exempt property for a particular debt is only a waiver of the exemption as to that debt and only to the extent necessary to satisfy that debt, therefore the right of the mortgagor to his exemption, which is favored by the law, is superior to the equity of the junior creditor; and the general rule as to marshalling assets between different creditors does not apply. *Armitage v. Toll*, 64 Mich. 412; *McLaughlin v. Hart*, 46 Cal. 638; *Wilson v. Patton*, 87 N. C. 318.

In *McArthur v. Martin*, 23 Minn. 74, and *Horton v. Kelly*, 40 Minn. 193, this Court adopted the latter rule where the second lien has been acquired by proceedings *in invitum*, and not by the contract of the debtor.

The mill building and machinery are found by the Court to be attached to the realty and are not personal property. The Bank never agreed that Dobson might erect the mill and place the machinery therein for temporary uses, and remove the same at the end of his tenancy. It does not appear that there ever was any tenancy. The Court has found that the whole mill and machinery are a part of the realty and not subject to the chattel mortgage and bill of sale. The general rule of law in regard to fixtures is, that whatever is once annexed to the realty becomes *prima facie* a part of it and cannot be afterwards removed. The facts in the cases cited by defendants do not correspond to the facts in this case, and, therefore, the same rule of law does not apply. The Bank has the right by law and in equity to hold the land, together with all improvements placed thereon by the mortgagor for the security of its claim. The mortgagor could not remove the mill, nor can he authorize Martin to do so. *Frankland v. Moulton*, 5 Wis. 1; *Lynde v. Rowe*, 12 Allen, 100; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Madigan v. McCarthy*, 108 Mass. 376.

Annexations made after the execution of the mortgage are subject to the same rule as those made before. *Coleman v. Stearns Manuf'g Co.*, 38 Mich. 30; *Burnside v. Twitchell*, 43 N. H. 390; *Blake v. Respass*, 77 N. C. 193; *Wood v. Whelen*, 93 Ill. 153; *Snedeker v. Warring*, 12 N. Y. 170; *Sweetzer v. Jones*, 35 Vt. 317; *Lynde v. Rowe*, 12 Allen, 100; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Wolford v. Baxter*, 33 Minn. 12; *Pond Machine Tool Co. v. Robinson*, 38 Minn. 272; *Woodham v. First Nat. Bank of Crookston*, 48 Minn. 67.

MITCHELL, J. The real issues in this case are somewhat obscured by the prolixity of the stipulated facts, (adopted by the trial court as its findings,) which contain much that was unnecessary for the determination of the case in the court below, and still more that is immaterial in the decision of any question involved in this appeal.

The primary object of this action was to foreclose a mortgage, and the principal question in the case is whether a certain building and the machinery therein, situated on the mortgaged premises, was, as between the plaintiff and defendants Dobson and Martin, the personal property of the latter, or a part of the realty, and hence covered by plaintiff's mortgage.

The short facts, so far as material to that question, are as follows: Defendant Stanton executed to plaintiff the mortgage in suit on his own real estate to secure the joint debt of himself and defendant Dobson. Subsequently Dobson, "with the knowledge and consent" of Stanton, erected and put on the mortgaged premises the building and machinery referred to, at his own sole expense, and mainly with money loaned to him by defendant Martin, to whom, as security for its repayment, he executed a bill of sale and chattel mortgage on the building and machinery. The building was a large, two-story frame structure designed for "an oatmeal mill," with a one-story brick addition for an engine and boiler room, in which were placed machinery suitable to manufacture oatmeal, and an engine and boiler, pulleys and shafting, sufficient to operate the same. This machinery was of the kind usually put in oatmeal mills, and was placed in and attached to the building in the usual way, some of it being screwed to the floor of the building, and some of it bolted to framework which was fastened to the floor, and

some of it held in position by its own weight, and all of it operated by shafting and belting, with power furnished by the engine and boiler.

There is no doubt but that such a building and machinery would, in the absence of any agreement of the parties to the contrary, become a part of the realty, and belong to the owner of the soil. *Prima facie*, all buildings belong to the owner of the land on which they stand as part of the realty. It is only by virtue of some agreement with the owner of the land that buildings can be held by another party as personal property. If erected wrongfully, or without such agreement, they become the property of the owner of the soil. But it is entirely competent for the parties to agree that they shall remain the personal property of him who erects them, and such an agreement may be either express or implied from the circumstances under which the buildings are erected. The trial court has made no direct or express finding as to whether there was any such agreement between Dobson and Stanton, and the question here is (first treating the case as if the controversy was between them) whether the facts found establish *prima facie* an implied agreement for separate ownership of the building and machinery. The fact that Stanton had mortgaged this property to secure a debt owing by Dobson as well as himself has no bearing upon the question in hand. That fact would not render it to Dobson's interest to expend his own money for the benefit of the land. Neither does the fact that the building was erected with money furnished to Dobson by Martin affect the question. Hence, reducing the facts found to their lowest denomination, they amount to just this: Dobson, who had no estate in the land, erected the mill at his own expense on the land of Stanton, "with the knowledge and consent" of the latter. The court did not find, and the stipulated facts do not disclose, a single other fact bearing on the question of the intention or implied agreement of the parties. The finding does, however, amount to one that the building was erected by permission and license from Stanton. At first we entertained some doubt whether this alone was sufficient to establish an implied agreement for separate ownership. Such an implication would not be drawn when a different intention of the parties is indicated by the terms of any express agreement between them on the subject, or when a different intention is

to be inferred from the interest of the party making the erections or from his relations to the title of the land.

But we have arrived at the conclusion that, where the erections are made by one having no estate in the land, and hence no interest in enhancing its value, by the permission or license of the owner, an agreement that the structures shall remain the property of the person making them will be implied, in the absence of any other facts or circumstances tending to show a different intention. This seems to us a reasonable doctrine, and one supported by the authorities, although we admit that in all the cases we have examined, including our own case of *Little v. Willford*, 31 Minn. 173, (17 N. W. Rep. 282,) there were always some other facts or circumstances in evidence bearing upon the question of the intention of the parties. Indeed, it would be difficult to conceive of any case where this would not be the fact if all the circumstances bearing on the question were fully in evidence. The present case comes up in the peculiar shape it does because submitted on stipulated facts probably more or less incomplete. See *Howard v. Fessenden*, 14 Allen, 124-128; also *Prince v. Case*, 2 Amer. Lead. Cas. (5th Ed.) 562.

We are therefore of opinion that the facts found establish *prima facie* an implied agreement between Dobson and Stanton for separate ownership of this building and machinery, and hence that, at least as between them, they would have remained the personal property of Dobson.

But plaintiff contends that to render it personal property as to it, it should have been a party to the agreement to that effect; and that, in the absence of any such agreement on its part, its rights must be determined by the rule which obtains between mortgagor and mortgagee, which is that all fixtures annexed to the land by the mortgagor become part of the mortgage security; and that the mortgagor could not give to a tenant or licensee a right which he himself did not possess.

Independently of any technical grounds, there are manifestly good reasons why this should be the rule as to the mortgagor himself, for, being the owner of land, and presumably looking to its redemption, it must be presumed that what he adds to it is for the benefit of his own estate, which he can always save by redeeming the premises.



It undoubtedly was formerly the rule that all fixtures annexed subsequently to the execution of the mortgage, whether annexed by the mortgagor or by his tenant or licensee under a lease or license subsequent to the mortgage, became, as to the mortgagee, a part of the realty. But this rule was founded upon the old common-law doctrine that a mortgage was a conveyance under which the mortgagee became the legal owner, and was entitled to immediate possession, the mortgagor in possession being considered strictly his tenant at will.

This is still the rule in those states—notably Massachusetts—which adhere to the doctrine that a mortgage is a conveyance. But the reasons for the rule have no application where, as in this state, a mortgage is a mere security, and neither conveys the title nor gives any right to the possession. Hence in those states where a mortgage is, as with us, a mere security, there is a general tendency to repudiate the old rule as inapplicable, and to hold that, as to fixtures placed on the mortgaged premises subsequently to the execution of the mortgage, there is no absolute presumption that they were annexed for the benefit of the realty, and that, where the intention or agreement of the mortgagor and the party making the annexation was that the thing annexed should not become part of the realty, the absence of a concurrent agreement to that effect on part of a prior mortgagee will not, of itself, make the annexation a part of the mortgage security. This would seem just, for, the annexation not having been made when he took his mortgage, he has not been misled, or advanced anything on the faith of it, and hence ought not to be permitted to avail himself of it as a part of his security, contrary to the intention of the party making the annexation. *Crippen v. Morrison*, 13 Mich. 23; *Davenport v. Shants*, 43 Vt. 546. See, also, *Tift v. Horton*, 53 N. Y. 380.

We are therefore of opinion that, upon the facts presented by the record, plaintiff has no better or greater right to these annexations than Stanton would have.

Certain questions arise as to the correctness of the directions of the court as to the order in which the premises covered by the several mortgages of the parties should be sold, and as to the distribution of the proceeds. As only Dobson and Martin appeal, their rights alone can be considered, and the rights of the other de-

fendants are material only so far as they bear upon the rights of the appellants. The material facts are as follows: Dobson owned three tracts of land, which, for convenience, we will call tracts A, B, and C, a part of C being his homestead.

He and his wife executed — *First* a mortgage on A; *Second*, a mortgage on both A and B; and, *Third*, a mortgage on C, (including his homestead,) as additional security for the same debt secured by the second mortgage. All of these mortgages are now held by the defendant Martin. Subsequently to the execution of these mortgages, Dobson and wife conveyed these tracts by warranty deed in the following order of time: *First*, tract A to defendant Stanton, who then executed thereon to plaintiff the mortgage now being foreclosed; *Second*, tract B to defendant Cunningham; *Third*, all of tract C, except their homestead, to defendant Palmer.

In this action the plaintiff asks for the foreclosure both of its own mortgage and of the three Martin mortgages, and that the lands covered by all of them be sold, and the proceeds applied according to rights of the several parties. If seasonably objected to, perhaps all of this could not be done in this action, but none of the defendants objected to it, and defendant Martin, in his answer, unites with plaintiff in asking that it be done.

In its judgment, the trial court, after directing that all four mortgages be foreclosed, and all the property covered thereby be sold, further directed, among other things: *First*, that all of the proceeds of the sale of tracts B and C be applied on Martin's second and third mortgages (which may be treated as one, being security for the same debt) before applying thereon any of the proceeds of tract A; *Second*, that the several lots constituting tract C be sold separately, and that the lot constituting Dobson's homestead should only be sold in case the other property covered by the second and third mortgages did not bring enough to satisfy the debt secured thereby.

The first of these directions was intended, in the interest of plaintiff's mortgage, to marshal the securities so as to require Martin to exhaust the other property covered by his mortgages before resorting to tract A, on which alone plaintiff had a lien. Defendant Martin urges that marshaling of assets or securities is only admissible between creditors of the same common debtor, to whom both

funds or securities belong. To this general rule there are some apparent exceptions, which, however, are within its spirit. For example, it will be allowed between creditors of different persons where it appears that the debtor whose estate is sought to be charged is primarily liable, and this for the same reason that subrogation may be admitted where the two securities belong to different persons if the fund not taken be one which in equity is primarily liable. Proceeding on the same principle is the equity rule that, if the owner of mortgaged lands sells portions of them to third parties, retaining part of them himself, unless the purchasers took *cum onere*, the portion so remaining in the mortgagor becomes the primary fund for the payment of the mortgage, and the portions sold are liable in the inverse order of their alienation. This is exactly this case. Stanton could have insisted on the application of this rule, and plaintiff, his mortgagee, stands, in that regard, in his shoes.

The application of this same principle fully disposes of Dobson's contention that his homestead should not have been sold until all the other property covered by the Martin mortgages, including tract A, had been exhausted. In *McArthur v. Martin*, 23 Minn. 74, we held that where A. held a mortgage on two tracts of land, one of which was the homestead of the mortgagor, and B. held a judgment against him which was a lien only on the other tract, A. would not be compelled to resort to the homestead first in order to leave the other tract as far as may be to B. This was upon the ground that to apply the rule in reference to marshaling securities in favor of a judgment creditor, who obtains his lien by proceedings *in invitum*, and not by contract of his debtor, would be but an indirect method of subjecting a homestead to the payment of debts; that, under such circumstances, a judgment creditor has no equity as against the homestead right of the debtor and his family. But where, as in this case, the mortgagor and his wife have voluntarily conveyed, with covenants of warranty, a portion of the mortgaged premises, they have no equitable right to insist that their homestead shall be protected, to the displacement of the countervailing equity of their grantee that the portion of the mortgaged premises retained by them shall be the primary fund for the payment of the mortgage. In the absence of legislation or of express agreement to that effect,

the courts are not warranted in interpolating any such stipulation into the contracts of parties.

The seventh conclusion of law of the trial court is also assigned as error. Taken literally, it might seem to mean that the court directed the payment to plaintiff of the proceeds of property not covered by its mortgage. The court certainly could not have intended this, and, if the language implies that, it was doubtless an inadvertent verbal inaccuracy, which the court would, and still will, correct upon attention being called to it.

Upon the appeal of Dobson the judgment is affirmed, and upon the appeal of Martin that part of the judgment which adjudges that the mill and machinery referred to are a part of plaintiff's mortgage security, is reversed, and a new trial of that issue only is ordered.

(Opinion published 56 N. W. Rep. 821.)

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## TOWN OF LYLE vs. CHICAGO, MILWAUKEE & ST. PAUL RY. Co.

Argued Oct. 20, 1893. Reversed Nov. 13, 1893.

No. 8158.

55	223
56	326
55	238
64	549
55	223
80	46

**Highway.** In proceedings to lay out, notice to landowner necessary.

In proceedings to lay out a highway the notice of the time and place of the hearing on the petition is jurisdictional, and must be given in strict conformity to statute, especially where it is only served on a party by posting.

**Land not properly specified in the notice of hearing.**

*Held*, that the notice in this case did not properly specify defendant's land as one of the tracts over which the highway would pass, and therefore as to it the proceedings were without jurisdiction and void.

Appeal by defendant, the Chicago, Milwaukee & St. Paul Railway Company, from an order of the District Court of Mower County, *John Q. Farmer, J.*, made December 30, 1892, denying its motion for a new trial.

On June 15, 1875, a petition was presented to the Board of Supervisors of the Township of Lyle in Mower County, asking them

to lay out a highway on the line between sections two (2) and eleven (11), Township 101, Range 18. The railroad of the defendant ran north and south across this line near the eastern line of the two sections. It owned a right of way one hundred (100) feet wide. It was not named in the petition as an owner of land to be taken, nor was it served with the notice of the time and place of meeting of the Supervisors to decide upon the petition, nor was it named in this notice as owner of land to be taken for the proposed highway. The Supervisors met July 24, 1875, and laid the highway on the line crossing the railroad track. The Railway Company neglected to build a crossing over its tracks at the intersection and the travel left the line as laid and turned off to the south going parallel with and west of the railroad track to the next crossing to the south. The railroad track was on an embankment six feet high at the point where the highway intersected it and could not be crossed without considerable grading. The Town brought this action April 11, 1891, under Laws 1889, ch. 222, § 6, to recover the penalty of \$30 for the neglect and \$10 a day additional for each and every day since July 24, 1890. The defendant answered denying that the *locus in quo* was a highway.

The issues were tried August 12, 1892, before the Court without a jury. On December 5, 1892, findings were made that the highway was legally laid out, that the Supervisors on June 23, 1890, established the slope to the grade for a crossing over the railway track and gave defendant notice to build the crossing, that it neglected to build it, that two hundred and thirty five days had since elapsed. As conclusion of law the Court found the Town entitled to judgment for \$2,650 and costs. The defendant moved for a new trial and being denied it appeals.

*Kingsley & Shepard*, for appellant.

The petition for the laying of the highway did not set forth in writing the name of the Railway as one of the owners of land over which the proposed highway was to pass. The proceeding for laying the highway was instituted under Laws 1873, ch. 5, as amended by Laws 1875, ch. 35. The statute, we think, requires the petition to set forth the names of such owners as could be ascertained by the use of reasonable diligence. *Harbeck v. Toledo*, 11 Ohio St. 219.

The supervisors' notice of hearing did not specify the land of the Railway as one of the tracts over which the highway was to pass. The statute, § 35, required the supervisors' notice of hearing to specify as near as practicable the highway proposed to be laid out, altered or discontinued, and the several tracts of land through which the same may pass. This objection goes to the jurisdiction of the supervisors and is one which could not be waived by appearing at the hearing. *Ruhland v. Supervisors*, 55 Wis. 664.

The land over which this highway was laid constituted more than one tract. It was subdivided by ownership and user into smaller tracts, and when the Legislature provided that the several tracts should be specified, it certainly was not intended that a general description without reference to ownership or user would be sufficient. *Wilcox v. Northern P. R. Co.*, 35 Minn. 439; *Sherwood v. St. Paul & C. R. Co.*, 21 Minn. 122; *St. Paul & S. C. R. Co. v. Murphy*, 19 Minn. 500; *Peck v. Superior Short Line R. Co.*, 36 Minn. 343; *Cameron v. Chicago, M. & St. P. Ry. Co.*, 42 Minn. 75.

There was no proper proof that the supervisors' notice of hearing was served upon the Railway, one of the occupants of the land through which the proposed highway was to pass. The only proof was an affidavit of T. K. Johnson that on July 12 and 13, 1875, he served the notice upon each of the occupants of the land through which the road was to pass, that on July 6, 1875, he posted copies of the notice in three public places in said town. This affidavit was not sufficient to show that the notice was served upon any of the occupants of the land, nor was it sufficient to show that it was posted in three public places in the town. *Appeal of the Central R. Co. of N. J.*, 102 Pa. St. 38; *Road in Sussex and Morris*, 13 N. J. Law, 157; *Golcher v. Brisbin*, 20 Minn. 453; *Godfrey v. Valentine*, 39 Minn. 336.

Notice personal or by posting was absolutely necessary to confer jurisdiction upon the Supervisors to consider the petition and lay the road. *Commissioners v. Harper*, 38 Ill. 103; *State v. Langer*, 29 Wis. 68; *Curran v. County of Sibley*, 47 Minn. 313; *Siman v. Rhoades*, 24 Minn. 25; *Lohman v. St. Paul, S. & T. F. R. Co.*, 18 Minn. 174; *City of St. Paul v. Nickl*, 42 Minn. 262; *Birge v. Chicago, M. & St. P. R. Co.*, 65 Iowa, 440; *Detroit, M. & T. R. Co.*

v. *City of Detroit*, 49 Mich. 47; *Ruhland v. Supervisors*, 55 Wis. 664; *Langford v. Commissioners of Ramsey County*, 16 Minn. 375. The supervisors did not award or assess any damages whatever to the Railway Company by reason of the laying of the highway; nor did they in the proceedings or otherwise assess or determine that the benefits and advantages accruing to the Railway Company were equal to the damages, or take any action whatever respecting damages to the Railway Company. This rendered the proceedings void. *State v. Chicago, M. & St. P. R. Co.*, 36 Minn. 402; *State v. District Court*, 42 Minn. 247; *State v. Shardlow*, 43 Minn. 524; *Leber v. Minneapolis & N. W. Ry. Co.*, 29 Minn. 256.

*D. B. Johnson and Davis, Kellogg & Severance*, for respondent.

The petition for the road, and upon which the supervisors relied and had a right to rely as to the facts, purported to set forth the names of the owners of the land. It was signed by Parmenter and Talouse and they were stated in it to be the owners of that portion of the land over which the Railway was built. One owned the farm on the north and the other the farm on the south of the proposed highway. However, under the law, this question cannot be raised in this collateral proceeding. Laws 1873, ch. 5, § 38. *Williams v. Williams*, 50 Wis. 311; *Barber v. Winslow*, 12 Wend. 102; *Ferris v. Bramble*, 5 Ohio St. 109; *Wells v. Hicks*, 27 Ill. 343; *Dumoss v. Francis*, 15 Ill. 543; *Humbolt Co. v. Dinsmore*, 75 Cal. 604.

To impeach the validity of the proceeding on the ground of failure to serve notice on owners or occupants of land over which the road passes, such failure must affirmatively appear by the records. *Williams v. Williams*, 50 Wis. 311; *State ex rel. v. Nelson*, 57 Wis. 147; *Lohman v. St. Paul, S. & T. F. R. Co.*, 18 Minn. 161; *Green v. State*, 56 Wis. 583; *Jackson v. Rankin*, 67 Wis. 285.

The Railway Company complains that the supervisors' notice of hearing did not specify its tract of land as one of the tracts over which the highway was to pass. The strip of land owned by the Railway Company is included in the notice in the designations of the farms by government subdivisions of the sections over which the railroad is constructed.

There was sufficient proof that the supervisors' notice of hearing was served upon all of the occupants of the land through which the proposed highway was to pass. The record shows that the notice was posted in three public places in the town as required by the statute. The recital of these facts in the order laying the road was sufficient proof. *Bruggerman v. True*, 25 Minn. 123; *Cassidy v. Smith*, 13 Minn. 129; *State v. Nelson*, 57 Wis. 147.

The next point made by appellant is that this notice of hearing was not in fact served upon the Railway Company. It is true that the notice was not personally served. The Court finds that the supervisors had no knowledge that the Railway Company owned the strip of land on which its railroad was laid. In cases like the present, where lands are unoccupied, the law requires the notice to be posted in order to give the supervisors jurisdiction. The posting of the notices was shown by recitals in the order and is constructive notice to all parties other than actual occupants, of the pendency of the proceedings. The word "occupant" must mean a person actually residing on the land, one having his place of abode on the premises, whether he be the owner or tenant. In the road law there is no provision for serving personally on any officer or agent of any foreign corporation, ticket agent or otherwise. The fact that the defendant might have a right of way across the premises under some arrangement between it and the owner, would not make it an occupant within the meaning of the law. *State ex rel. v. Chicago, B. & Q. R. Co.*, 68 Ia. 135; *State v. Wertzel*, 62 Wis. 184.

MITCHELL, J. This action was brought under Laws 1889, ch. 222, to recover damages for defendant's neglect to build a highway crossing.

The defendant rests its defense on two propositions: First, that there was no highway across its railroad at the point named; second, that the statute referred to is, as applied to the alleged highway, unconstitutional. We find it necessary to consider only the first.

The highway is claimed to have been laid out by the town supervisors in 1875. The law then in force regulating such proceedings was Laws 1873, ch. 5, as amended by Laws 1875, ch. 35, which, as subsequently amended, is 1878 G. S. ch. 13. The condition of things



when these proceedings were instituted in 1875 was as follows: The defendant, a foreign corporation operating a railway in this state under authority of our laws, owned in fee a strip of land one hundred (100) feet wide, running north and south through the east half of the southeast quarter of section two (2) and the northeast quarter of section eleven (11) in the town of Lyle. There were no buildings and no one residing on this strip, nor was it inclosed by a fence, but defendant was in the actual possession, and had built and was maintaining its railroad upon it, over which it was daily running its trains. The defendant maintained stations along its road, one of which was within the town of Lyle, at each of which it kept a regular ticket and freight agent for the transaction of its business. The remainder of the two above-described government subdivisions was in the possession and occupancy, respectively, of two of the petitioners for the road, Parmenter and Talouse.

We next turn to the proceedings themselves. The petition for the highway assumed to give the names of all the owners of the land over which the road would pass, except of one tract, (not here involved,) who was stated to be unknown; but it nowhere stated the name of the defendant as one of such owners, nor was its land anywhere described, nor was there anything in the petition to show that the proposed highway would pass over its land, except that it gave the route or line of the highway, which, if compared with the actual location of defendant's land, would show that it would cross it.

The notice of the time and place of hearing the petition made out by the supervisors described the line of the proposed highway, and assumed to give the description of the several tracts of land over which it would pass; also the names of the several occupants thereof. Defendant's name was not stated in this notice (which was not addressed to any one) as owner or occupant of any of these tracts; neither was its land described or referred to at all, except that the entire government subdivisions, of which it was a part, were described as a whole, and the occupants thereof stated to be Parmenter and Talouse, respectively.

This notice was never served on defendant, unless posting copies thereof in three public places in the town constituted such service.

The defendant was not made a party to these proceedings, nor did it ever appear therein, and no jurisdiction of it or of its property was ever acquired, unless by virtue of the facts above stated. The part of the alleged highway across defendant's land has never been opened for travel or in any manner used by the public; on the contrary, the defendant has ever remained in the exclusive and uninterrupted possession of the land.

On this state of facts we are of opinion that the supervisors never acquired jurisdiction, and that, as to defendant, the proceedings are wholly void, for the reason that no notice thereof was ever served on it. It is fundamental that a party whose property is to be taken for public use must have notice and an opportunity to be heard, and this is just as applicable to railway companies as to any other property owner. In proceedings of this kind notice by publication or by posting may be sufficient. But reasonable notice of some sort is absolutely essential and jurisdictional, and the notice required by the statute must be given in strict conformity to the statute.

If this defendant was "an occupant," within the meaning of the statute, (section 35,) then the law was certainly not complied with. If it be said that the statute makes no provision for service on an occupant in a case like this, and that the provision for service on station or ticket agents is inapplicable, then so much the worse for the statute, for the law, to be valid, ought and must provide for some mode of service. But, assuming that the defendant was not an "occupant" within the meaning of the law, and that that term only applies to one residing on the land, then the posting of notice of hearing, and possibly the prior posting of the petition itself, is the only notice of the proceedings which the law provides for such cases. This kind of notice is so meager, and so little likely to come to the knowledge of parties not actual residents of the neighborhood, that it would at best barely amount to reasonable notice, and hence the requirements of the statute in that regard should be very strictly and fully complied with.

The statute requires that the petition shall state the names of the owners of the lands, if known, over which the road is to pass. The petition in this case did not state the name of defendant as one of such owners, or state that the name of the owner of its

tract of land was unknown. In fact the petition could not have truthfully stated the latter fact, for the actual possession and use of its land by defendant was a physical fact, patent to the eyes of the petitioners. The statute also requires that the notice of hearing on the petition shall specify the several tracts of land through which the road will pass.

The manifest object of this is to give notice to the owners of the several tracts that their land will be affected by the proceedings. The notice in this case did not specify defendant's land as one of the tracts through which the road would pass, unless done by specifying as a whole the governmental subdivisions of which it was a part, but as occupants of which it gave the names of other parties, the name of defendant being neither given nor referred to. There was in fact nothing in either the petition or the notice that would advise or suggest to any one that the highway would pass over defendant's land, unless by comparison of the route of the highway with a sectional map of the township, showing the actual location of defendant's railway on the ground. This would be a compliance with neither the letter nor the spirit of the statute. It will not do to say that defendant's tract of land was specified because the government subdivisions in which it was situated were specified and stated to be occupied by those persons who were occupants of the balance of these subdivisions. With equal force it might be argued that if two farmers had each an eighty acre farm in the same quarter section it would be sufficient notice to one of them to describe the whole quarter section as a single tract, and give the name of the other as the occupant of the whole; or, to carry the proposition still further, that, if four farmers had each 160 acres in the same section, to specify the whole section as one tract, and give the name of one of them as the occupant of the whole, would constitute sufficient notice to the other three. This will not satisfy the requirements of the statute. For the want of proper notice the supervisors never acquired jurisdiction of defendant, and as to it the proceedings are void. This renders it unnecessary to consider any of the other questions discussed by counsel.

Order reversed.

(Opinion published 56 N. W. Rep. 830.)

**JOHN H. LESLIE *et al.* vs. GEORGE L. GODFREY *et al.***

Submitted on briefs Nov. 3, 1893. Reversed Nov. 13, 1893.

No. 8340.

**Garnishment, practice on claim of a third party.**

Where a claimant of the money or property in the possession of the garnishee appears and pleads, setting up his claim, the issue as to whether the money or property belongs to him or to the defendant in the action should be tried in the ordinary way,—upon the evidence produced by the respective parties.

Appeal by plaintiffs, John H. Leslie, Frederick G. Baker and George H. Leslie, from an order of the District Court of Rice County, *Thomas S. Buckham, J.*, made March 3, 1893, discharging the garnishees, George R. Newell *et al.*

The plaintiffs were doing business at Chicago, Ill., and on October 5, 1892, made a contract with the defendant George L. Godfrey in which he agreed to sell and deliver to plaintiffs free on board cars at Faribault, Minnesota, 8,000 cases of canned corn for \$14.100. Godfrey failed to deliver the corn and plaintiffs commenced this action against him on November 4, 1892, to recover \$2,400 damages they claimed to have sustained by his breach of the contract. At the same time they caused an affidavit to be made and filed stating that George R. Newell, Robert B. Langdon and Cavour S. Langdon, copartners, were indebted to Godfrey over \$25 and issued a garnishee summons requiring them to appear before the Court on November 26, 1892, and answer touching their indebtedness to Godfrey. The garnishees appeared and disclosed that they had bought of Godfrey 5,500 cases of canned corn from the factory at Faribault, on which they owed over \$2,500, but that Donald Grant, D. W. Grant, H. M. Matteson and N. S. Flint, copartners, doing business under the name Northwestern Canning Co. claimed the money, and that Godfrey claimed that he was only manager, and that they, the garnishees, were unable to say to whom the debt was owing.

Upon this disclosure plaintiffs obtained an order requiring Donald Grant and his copartners to appear in the action and maintain their right within twenty days or be barred of their claim. Grant and his copartners, claimants, were served with notice and a copy of this order and on February 14, 1893, they made and filed their statement of claim and were joined as parties claimants in the action. They claimed to have owned the corn and to have sold it to Newell & Co. and that the price was due to them and not to Godfrey. On the next day the claimants and Godfrey jointly gave notice that they would on February 25, 1893, move the Court, upon the pleadings, disclosure and all the files and records in the action, for an order discharging the garnishees, on the ground that plaintiffs were not entitled to judgment against the garnishees or to file a supplemental complaint against them. On the hearing the motion was granted and plaintiffs appeal therefrom.

*Fletcher, Rockwood & Dawson, for appellants.*

The Court below has not stated its reasons for the order in the record; but, outside, has said it was founded upon the fact that the plaintiffs had not met the claim filed by the claimants with a counter pleading denying the matters therein stated. Upon the argument of the motion the claimants contended that the disclosure of the garnishees showed conclusively that the garnishees held no property belonging to the defendant, and owed the defendant nothing and for that reason the garnishees should be discharged. The notice of motion was served the next day after the claim of Grant and his copartners was filed and the motion was heard ten days thereafter and was decided six days after this hearing. The time to answer this claim had not even then expired. The plaintiffs' practice was correct. 1878 G. S. ch. 66, § 174. *Donnelly v. O'Connor*, 22 Minn. 309; *Mansfield v. Stevens*, 31 Minn. 40; *North Star B. & S. Co. v. Ladd*, 32 Minn. 381; *McMahon v. Merrick*, 33 Minn. 262; *Williams v. Pomeroy*, 27 Minn. 85; *Smith v. Barclay*, 54 Minn. 47.

If the pleading needed an answer the plaintiffs must certainly, in absence of any other rule fixed by the Court, have twenty days to make such answer, and, after the hearing of the motion, plaintiff

had still nine days in which to put in its answer. The Court was simply entertaining a motion for judgment on the pleadings before the pleadings were made up.

*George N. Baxter*, for respondent.

There was no suggestion on the argument of the motion that plaintiffs desired to offer any other or further evidence in opposition to or contradiction of that of the garnishees. There was no objection by plaintiffs that the motion was premature, or any intimation that they desired to supplement the disclosure by other evidence. They did not intimate that they desired or intended to file an answer to the claim of Grant and his copartners, and their position is yet, that no answer thereto was necessary. If they had the right to answer they waived it by voluntary submission of the matter upon the pleadings, evidence and facts then before the Court. *Shafer v. Vizena*, 30 Minn. 387.

The parties having voluntarily assented that the Court should consider and determine the motion upon the facts then appearing, the only question is whether or not upon these facts the garnishees were entitled to be discharged. We maintain they were.

**MITCHELL, J.** After commencing this action against defendant Godfrey, the plaintiffs garnished Newell & Co., who appeared and made their disclosure, from which it appeared that Grant and others, a partnership under the name of the Northwestern Canning Company, claimed the money in the hands of the garnishees. Thereupon the court ordered that notice be served on the claimants to appear and maintain their right, or to be barred of their claim. In pursuance of the notice, the claimants appeared, and served—not earlier than February 14th—their pleading, in the nature of a complaint in intervention, alleging that they were the owners of the fund sought to be reached by the garnishee proceedings. In this condition of the proceedings, the court, on February 25th, on motion of the defendant, the garnishee, and the claimants, made on “the pleadings, records, and proceedings in said action, on file, including the disclosure of the garnishees,” ordered, against the opposition of the plaintiffs, that the garnishees be discharged. Plaintiffs appeal from this order.

The learned trial judge did not indicate the grounds upon which he granted the motion; and counsel for respondents suggest none, and none now occur to us, upon which the order can be sustained. The proper course or procedure in such a case, under the statute, has been quite clearly defined by the decisions of this court, especially *Smith v. Barclay*, 54 Minn. 47, (55 N. W. Rep. 827.) After the claimants served their pleading setting up their claim, the plaintiffs had twenty days in which to answer, if an answer was necessary. This time had not expired when the motion was granted.

And whether an answer was necessary, or whether the issue would be deemed joined by the affidavits of plaintiffs for garnishment, and the pleading of the claimants, in any event the plaintiffs were entitled to a trial in the ordinary way, on the proofs to be offered by the respective parties, of the question whether the fund in the hands of the garnishee belonged to the defendant or to the claimants. For the court to discharge the garnishees on motion without such trial was error.

The only answer to this, suggested by counsel, is that the plaintiffs voluntarily submitted the issue on the facts before the court on the motion. The record does not show any such thing. On the contrary, it shows that plaintiffs opposed the motion. What reasons they urged in opposition to it do not appear, and is not for us to conjecture.

**Order reversed.**

(Opinion published 56 N. W. Rep. 818.)

LLEWELLYN A. COBB *et al.* vs. JOHN R. COLE.

Argued Nov. 7, 1898. Affirmed Nov. 18, 1898.

No. 8318.

**Findings justified by the evidence.**Findings *add* to be justified by the evidence.

Appeal by plaintiffs, Llewellyn A. Cobb and Alfred F. Norrish, from a judgment of the District Court of Dakota County, *F. M. Crosby, J.*, entered April 26, 1893, that they take nothing by their action and that defendant recover of them his costs taxed at \$17.25. The facts in this case appear in the report of a former appeal. 51 Minn. 48. The discussion in this Court on the present appeal was upon the evidence, whether or not it sustained the findings of fact made by the trial Court.

*Owen Morris*, for appellant.*Hodgson & Schaller*, for respondent.

MITCHELL, J. This case has already been twice before this court. 44 Minn. 278, (46 N. W. Rep. 364;) 51 Minn. 48, (52 N. W. Rep. 985.) Most of plaintiffs' assignments of error (twelve in number) are predicated upon what we deem a mistaken idea as to the real issue in the case. The complaint alleged that the agreement of the parties was that the plaintiffs were to pay the defendant "a sum equal to his one-third interest in the firm business, as the same then appeared upon the books of the firm;" that a statement was taken from the firm books; that the statement was erroneous, and showed the interest of the defendant to be larger than it really was, according to the terms upon which the settlement was to be made, "as from the books of said firm fully appears." There is nowhere a single allegation that the books themselves were incorrect, but the sole ground on which the plaintiffs sought relief was that the "statement" on which the parties made the settlement was not an accurate statement of what the books showed. But now plaintiffs seek to inject a new issue into the case, viz. that the books themselves were inaccurate; and this, too, in the face of the fact that they



themselves alleged, what has always been conceded up to the present time, that the agreed basis on which the settlement was made was what the books then showed. Hence, after the first two trials, the only material issue that remained to be tried was whether the statement taken from the books, and upon which the settlement was made, correctly stated what the books showed; and that the court was justified in finding that it did is conclusively established by the stipulation of the parties. The findings of the court, that there were mistakes in the books, were wholly immaterial, and outside of the issues in the case.

In this view of the case, it becomes unnecessary to consider the other assignments of error.

Judgment affirmed.

(Opinion published 56 N. W. Rep. 833.)

Application for reargument denied November 21, 1893.

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**MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RY. Co. vs. HOME  
INS. Co.**

Argued Oct. 23, 1893. Reversed Nov. 13, 1893.

Nos. 8359; 8260.

**Policy of insurance construed.**

The policy issued by defendant to plaintiff on the property of shippers construed as an insurance for the benefit of plaintiff to the extent only of its liability as carrier and warehouseman.

**Parol evidence to vary written contract.**

In an action on the policy the bills of lading fixing the liability of the plaintiff to the shippers as carrier and warehouseman are the measure of defendant's liability to the plaintiff, and cannot be varied by parol evidence. In an action to enforce rights dependent on a written contract, although the suit be between strangers to the instrument, or between a stranger and one of the parties to the contract, the rule against varying a written instrument applies. A liability incurred by the plaintiff on a collateral contract to procure insurance on the property of shippers is not a liability as carrier or warehouseman, within the meaning of the policy.

55	236
56	356
55	236
60	392
55	236
64	62
55	236
69	317
55	236
71	399

Appeal by defendant, the Home Insurance Company of New York from an order of the District Court of Hennepin County, *Seagrave Smith, J.*, made March 21, 1893, denying its motion for a new trial.

Appeal also by plaintiff, the Minneapolis, St. Paul and Sault Ste. Marie Railway Company, from that part of the same order reducing the verdict from \$52,673.55 to \$30,136.97.

On September 5, 1891, the Insurance Company in consideration of \$600 premium insured the Railway Company for three months against all direct loss or damage by fire which it might sustain, not exceeding \$50,000 "on flour, corn, grain, seeds, provisions and other merchandize, excluding petroleum and its products, it being understood and agreed that the insurance under this head is to cover the liability of the Railway Company as carriers and warehousemen as well as its own property and its charges for freight or moneys paid on or charged on for which the Company is liable or may have earned while contained in its elevator situated at Gladstone, Mich." The Railway Company was doing business as a carrier of grain from Minneapolis by cars to Gladstone and sending it from there by vessels to Buffalo, N. Y. It unloaded the grain from its cars into this elevator where it remained until it could be loaded upon vessels. Several dealers at Minneapolis employed the Railway Company to carry their grain to Buffalo by this route. On November 29, 1891, the elevator and 74,054 bushels of wheat therein were casually destroyed by fire. The wheat belonged to such dealers and was worth \$60,273.94. The Railway Company had earned freight by carrying it thus far and for storage in this elevator, \$3,768.03, but had no other interest in the wheat. The owners had not insured this wheat. They relied upon an oral understanding with the Railway Company that it would insure it for their benefit, but the bills of lading given the shippers provided that the Railway Company should not be liable for any loss or damage to the property arising from or caused by fire, not caused by its own negligence. By the policy other insurance was permitted, to the amount of \$50,000 in other insurance companies. Such insurance was made on grain while in this elevator and belonging to the Railroad Company or held by it in trust. This action was brought by the Railway Company to recover of the Home Insurance Company the sum insured. The defendant denied liability, except for one

half the freight and storage earned. The issues were tried on December 13, 1892.

At the close of the evidence the Judge instructed the jury to return a verdict for the plaintiff for the \$50,000 and interest. The defendant excepted and moved for a new trial. After argument the trial Court was of opinion that defendant was liable for only one half the value of the wheat, because of the other insurance and ordered the verdict to be cut down to \$30,136.97 and directed that plaintiff have judgment for that amount with interest and costs. The plaintiff appeals from that part of the order reducing its recovery and the defendant appeals from the refusal of its motion for a new trial.

*S. E. Hall, H. S. Durand, McVey & Cheshire*, for the Insurance Co.

The policy issued by this defendant insures only the liability of the railroad company. It does not insure the goods. This distinction must be kept in mind, that the other companies insured the goods and the Home Company by its policy insured the Railroad Company's liability only. *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527.

What is covered by the policy must be ascertained by the words written in the policy. *Frost's D. L. & W. W. Works v. Millers & M. M. Ins. Co.*, 37 Minn. 300; *Burton v. Connecticut Mutual Life Ins. Co.*, 119 Ind. 207; *Mills v. Farmer's Ins. Co.*, 37 Ia. 400; *Fuller v. Phoenix Ins. Co.*, 61 Ia. 350; *Gillett v. Liverpool L. & G. Ins. Co.*, 73 Wis. 203; *Blake O. H. Co. v. Home Ins. Co.*, 73 Wis. 667; *King v. Merriman*, 38 Minn. 47.

The Court below seems to have ignored the fact that the railroad company performed its oral agreement with the shippers and did obtain insurance upon the grain at its own expense for the sum of \$50,000 in the other companies.

Although the bill of lading issued and accepted exempted the carriers from liability for fire, yet the bill of lading was in no sense inconsistent with the allegations in the complaint and the proof, that the railroad company also agreed to procure insurance for the benefit of the owners. The owners had a right to accept the bill of lading and then go out and procure insurance from an

insurance company, or they could contract with the railroad company to insure. This is what they did do as the evidence shows.

The terms of the policy of the Home Insurance Company cover in express words the liability of the railroad company as carriers and warehousemen. The liability of the railroad company as established by the evidence was not as a carrier or warehouseman. Its liability to the shippers arises out of an oral contract between it and the owners of the grain to insure the grain for their benefit.

The grain in question was shipped over the plaintiff's railroad upon bills of lading, which exempted the railroad company from liability on account of fire. Parol evidence was not admissible to vary or contradict the terms of the bill of lading, and the defendant insurance company stands in the shoes of the railroad company and may make any defense in this case which the railroad company could itself have made had it been sued by the shippers. The railroad company not being liable to the shippers, this defendant is not liable to the plaintiff, because by the terms of the policy it only insured the *liability* of the plaintiff.

The effect of exchanging a small shipping receipt for a large bill is stated in *Wild v. Merchants D. T. Co.*, 47 Ia. 247, as follows;

"Where a common carrier upon the delivery of merchandize for transportation issued to the consignor a shipping receipt, which stated that the bill of lading would be issued upon application at a place designated therein and that the merchandize would be transported subject to the conditions expressed in the bill of lading, held that the bill of lading and not the shipping receipt embodied the contract of the parties and that the consignee would be bound by the conditions expressed in such bill of lading.

A warehouseman is only liable for his own negligence. There can be no pretense here that plaintiff is liable simply as a warehouseman, because there is no pretense that the fire was caused by the negligence of plaintiff. *Aldrich v. Boston & W. R. Co.*, 100 Mass. 31; *Rice v. Nixon*, 97 Ind. 97; *Clafin v. Meyer*, 75 N. Y. 260; *Willet v. Rich*, 142 Mass. 356.

*A. H. Bright and Kitchel, Cohen & Shaw, for the Railway Co.*

The contract as established by the parol evidence was a contract under the common law liability of carriers to carry the grain to

Gladstone, and thence deliver it through its elevator upon the vessel of the next water carrier at Gladstone. It was not an agreement to insure, but an agreement at common law to deliver to the next connecting carrier. The oral evidence was properly received. The rule that parol evidence is inadmissible to vary the terms of a written instrument is applied only in suits between the parties to the instrument, or their privies, and not to suits where the issue is between one of the parties to the instrument and a third person. *Van Eman v. Stanchfield*, 10 Minn. 255; *Sanborn v. Sturtevant*, 17 Minn. 200; *National C. & L. Builder v. Cyclone S. S. P. Co.*, 49 Minn. 125; *Burton v. Beal*, 49 Minn. 230; *Clerihew v. West Side Bank*, 50 Minn. 538; *Lee v. Adsit*, 37 N. Y. 78; *McMasters v. President Ins. Co. of N. Am.*, 55 N. Y. 222; *Lowell Manuf'g Co. v. Safeguard Fire Ins. Co.*, 88 N. Y. 591.

The plaintiff was not a warehouseman with reference to the grain. The answer admits that plaintiff was the owner of the elevator at Gladstone and that it was used by the plaintiff in its business as a common carrier.

If the Railway Company be held liable for the grain in the elevator as a common carrier, then in the absence of proof as to the origin of the fire, defendant was liable for the grain destroyed in the elevator and is within the terms of the policy as interpreted by the defendant.

There can be no contribution between "in trust" policies and policies insuring liability. *North British & M. Ins. Co. v. London & L. & G. Ins. Co.*, 5 Ch. Div. 569; *Lowell Manuf'g Co. v. Safeguard Ins. Co.*, 88 N. Y. 591.

The insurance of the defendant covered the ultimate liability, and it must alone bear the loss to the amount of its policy.

MITCHELL, J. By the policy in suit the defendant insured the plaintiff "on flour, corn, grain, seeds, provisions, and other merchandise, excluding petroleum or its products; it being understood and agreed that the insurance under this head is to cover the liability of the insured as carriers and warehousemen, as well as their own property, \* \* \* while contained in their elevator situated at Gladstone, Mich." It is too plain to admit of argument that, as to the property of others intrusted to its custody, this was not an

insurance for the benefit of the shippers, but for the benefit of the plaintiff exclusively, and only to the extent of its own interest. It is well settled that, if the carrier would insure for the benefit of the owners of the property, this must appear from the use of apt terms in the policy to that effect. There is not a word in this policy that indicates any intent to insure any other interest than that of the plaintiff to the extent of its liability as carrier and warehouseman.

It necessarily follows that to entitle plaintiff to recover it was incumbent on it to prove that it was liable as carrier or warehouseman to the owners for the loss of the grain destroyed by fire in its elevator at Gladstone.

Recognizing this fact, the plaintiff alleged in its complaint agreements between itself and the several shippers that it would procure at its own expense policies of insurance on their grain against loss by the fire while in this elevator. Upon the trial the plaintiff itself introduced the bills of lading issued by it to the several shippers, by the terms of which it was expressly provided that plaintiff should not be liable for any loss of or damage to the property by fire not caused by its negligence or that of its agents. It may be here stated that the grain was consigned to Buffalo, and was destroyed by fire while in the elevator at Gladstone, awaiting delivery by plaintiff to the next succeeding line of carriers. The plaintiff was then permitted, against the objection and exception of the defendant, to introduce parol evidence of an agreement between itself and the shippers, made at or prior to the shipment of the grain, and prior to the execution of the bills of lading referred to, that it would procure insurance on the grain as alleged in the complaint. Even if this evidence was otherwise competent, it was inadmissible for the reason that it did not tend to prove any liability of plaintiff as carrier or warehouseman, which was all against which the defendant had insured it. But to this point we shall refer hereafter.

One ground on which counsel seek to sustain the admissibility of this oral evidence is that the rule against varying a written contract by parol applies only to controversies between parties to the instrument and their privies, and not to controversies between strangers to the contract, or between one of the parties to the instrument and a stranger to it. The rule is as stated, with this

limitation, however: that the right in the latter class of cases to vary a written contract by parol is limited to rights independent of the instrument. As to rights which originate in the relation established by the written contract, or are founded upon it, the rule against varying it by parol applies. *Browne*, Parol Ev. § 28; *Sayre v. Burdick*, 47 Minn. 367, (50 N. W. Rep. 245;) *Wodock v. Robinson*, 148 Pa. St. 503, (24 Atl. Rep. 73.)

In the present case plaintiff is claiming under this policy rights wholly dependent upon its liability to the shippers of the grain. That liability is at once both the basis and the measure of defendant's liability; and it would be most unreasonable that it should be allowed, as against defendant, to establish that liability by proof of oral promises to the shippers which the latter could not prove against it. If the bill of lading is conclusive between the shippers and the plaintiff, it must be equally so, in this case, between the plaintiff and the defendant.

Counsel further claims that this parol evidence was also admissible as showing that the bills of lading were in fact never accepted as the contract between the parties; in other words, as we understand counsel, they propose to throw aside the bills of lading as never having become operative, ignore the express oral agreement to insure, and then rest their case upon an alleged oral contract of carriage, in which there were no exceptions to the common-law liability of carriers. With all due respect to counsel, it seems to us that this contention is entirely baseless.

The complaint was framed, and the case tried throughout upon the theory that the liability of plaintiff to the shippers grew out of the express agreement of the former to insure the grain, and the record contains nothing even suggestive of the present contention of counsel.

The evidence furnishes no support to this contention.

The undisputed facts are that the manner in which the business was done was that, immediately upon loading a car, a short bill, or, as it is called, a "shipping receipt," was issued to the owner, and, when a sufficient number of cars had been loaded to constitute a "shipment," the shipper surrendered these receipts to the plaintiff, and received in their place a regular or large bill of lading, of the form already described, to which was attached a list of all the

cars in the shipment. These bills of lading the shippers attached to the drafts drawn on the consignees. This had been the customary and uniform manner of doing business between the parties for years. These large bills of lading had always been accepted and used by the shippers without objection. This conclusively proves that the owners perfectly understood, when shipping the grain, that these large bills of lading, and neither their preliminary talks nor the small "shipping receipts," were to be the final repository and sole evidence of the contract between themselves and the plaintiff. In the absence of fraud or mistake, of which there is no claim, the bills of lading must be conclusively presumed to be the final and complete expression of the engagements of the parties; certainly, at least, of the obligations and liabilities of the plaintiff as carrier or warehouseman in the transportation of the property.

Whether, as between the shippers and the plaintiff, the former could show by parol, as a collateral agreement, an undertaking to procure insurance on the grain, it is unnecessary to consider, for under such an agreement the liability of the plaintiff would not be as carrier or warehouseman, against which alone the defendant insured. The undertaking of the defendant to insure the plaintiff against its liability as carrier and warehouseman can have but one meaning, viz. the liability growing out of the relation of carrier and warehouseman as such. It was never intended to cover liabilities which the plaintiff might incur by virtue of special contracts as to matters entirely outside of their common-law liability as carriers and warehousemen. It is no part of the duty of common carriers to procure insurance on property intrusted to their custody for the benefit of the owners. Had this plaintiff, in order to secure the business of these shippers, guaranteed them a certain profit on their grain, or the receipt of a certain price for it after its arrival at Buffalo, there would have been as much reason for claiming that the liability thus incurred was covered by this policy as that incurred by the agreement to procure insurance on it. Counsel are not correct in saying that the liability incurred by the agreement to procure insurance is nothing more than the unqualified common-law liability of a carrier. Suppose, for example, the plaintiff had, in the exercise of ordinary diligence, secured policies of insurance on this grain, and some of the insurance companies had become in-



solvent. The plaintiff would not have been liable on its contract to procure insurance, but it might have been liable as carrier. Again, suppose plaintiff had failed to procure insurance, and the grain had been destroyed from some cause for which a common carrier is not liable, it would nevertheless have been liable for its failure to perform its contract to procure insurance. But further discussion is unnecessary. The policy was never intended to cover liabilities which the plaintiff might incur regarding the property by special contracts entirely outside of and foreign to its common-law duties as carrier or warehouseman. It may be added that there is no claim that the loss was caused by the negligence of the plaintiff, and hence not within the operation of the stipulation in the policy exempting it from liability for loss by fire. Under no view of the case can the plaintiff recover.

On defendant's appeal the order appealed from is reversed. On plaintiff's appeal that part of the order appealed from is affirmed.

(Opinion published 56 N. W. Rep. 815.)

Application for reargument denied December 20, 1893.

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**BETTY WEITZNER *et al.* vs. OLE A. THINGSTAD.**

Argued Nov. 1, 1893. Affirmed Nov. 13, 1893.

No. 3445.

**Husband's contract to sell his homestead is void.**

The contract of the husband, without his wife joining therein, to convey his homestead, is void for all purposes, and the husband is not liable in damages for its nonperformance.

**But valid as to other lands included.**

But, where such contract also includes other lands, it is valid as to such other lands.

Appeal by plaintiffs, Betty Weitzner, Charlotte Gruenberg and Simon Gruenberg, from an order of the District Court of Hennepin County, *Frederick Hooker, J.*, made March 1, 1893, overruling their demurrer to the second defense stated in the answer.

The complaint stated that on September 20, 1892, defendant Ole A. Thingstad made a contract with plaintiffs to convey to them with warranty two lots in Minneapolis for \$23,000. They agreed to pay him \$12,000 in fifteen days at which time he and his wife were to give plaintiffs a deed of the lots subject to a mortgage for \$11,000 then on the property, which mortgage plaintiffs were to assume. That on October 4, 1892, plaintiffs tendered the \$12,000 and demanded a deed, but defendant refused and ever since has failed and refused to deed to them the property or any of it, to their damage \$10,000 for which sum they prayed judgment. The defendant denied that the contract was delivered by him and for a second answer alleged that he was married and lived with his family on one of the lots. That it was and long had been his homestead, that his wife did not join in or execute the contract with him and it was for that reason void. To this second answer the plaintiffs demurred. The demurrer was overruled and plaintiffs appeal.

*Chas. J. Bartleson*, for appellants.

We concede that the contract is ineffectual as to the homestead and the only question is whether it is valid as the personal obligation of the defendant so as to render him personally liable in damages for its nonperformance. Specific performance of the contract cannot be decreed while the wife lives and occupancy of the family continues, but it does not follow from this that the husband is not liable in damages to plaintiffs, the same as he would be on any other covenant he had rendered himself unable to perform. *Yost v. Devault*, 9 Ia. 60; *Cross v. Everts*, 28 Tex. 523; *Wright v. Hays*, 34 Tex. 253.

In our leading case of *Barton v. Drake*, 21 Minn. 299, this Court was careful to say that such a contract is ineffectual to bind the land. The defendant's liability in damages for refusal to perform was not before the Court in that case, nor in any of the subsequent cases in this Court; and where this Court has said that such contract is entirely void, it must be understood to mean with reference to specifically enforcing the contract. The authorities cited in *Barton v. Drake*, *supra*, in support of the proposition, do not go beyond this.

Aside from the Texas cases cited, I have not been able to find authorities bearing directly on this point. One who absolutely and unconditionally agrees to do any lawful act is ordinarily held liable in damages for his failure to do it.

The answer demurred to alleges that a part only of the property was defendant's homestead. This would not under any circumstances render the contract void *in toto*, but only void as to the homestead. *Wallace v. Harris*, 32 Mich. 380; *Burnap v. Cook*, 16 Ia. 149.

It is true that a gross consideration was agreed upon for both lots, but it is susceptible of proof upon the trial what the damage of the plaintiffs was for the refusal to convey the nonexempt lot and the relative value of the two.

*Gjertson & Rand and Henry J. Gjertson*, for respondent.

It must be presumed that the parties knew when they made the contract that it was absolutely void, and if they contracted with that knowledge, how could the plaintiffs be damaged. They had no right in law to rely in any way upon the performance of an absolutely void contract. It was absolutely void in its inception and cannot possibly be made the basis for an action of damages. *Barton v. Drake*, 21 Minn. 299; *Smith v. Lackor*, 23 Minn. 454; *Coles v. Yorks*, 28 Minn. 465; *Alt v. Banholzer*, 39 Minn. 511; *Jelinek v. Stepan*, 41 Minn. 412.

In Iowa it has been held that an action could not be maintained for damages against the husband on a contract of this character where the wife has not joined in and become a party to the contract. *Barnett v. Mendenhall*, 42 Ia. 296; *Clark v. Evarts*, 46 Ia. 248; *Cowgell v. Warrington*, 66 Ia. 666.

Plaintiffs suggest that only one of the lots was the defendant's homestead and therefore the contract is not void *in toto*, but only void as to the homestead lot. If that part of the answer setting up the homestead claim as a defense is available to the defendant for any purpose, then the demurrer was properly overruled.

MITCHELL, J. This was an action to recover damages for the refusal of the defendant to perform a contract to convey real prop-

erty. One of the defenses interposed by the defendant was that a part of the premises contracted to be conveyed was his homestead, and that his wife did not join in the contract, and that for that reason it was void. This appeal is from an order overruling a demurrer to this defense. The contention of plaintiff is that while a contract by the husband, without his wife joining therein, to convey his homestead, is so far void that it does not bind the land, and that specific performance cannot be enforced, yet it is only void in that sense and to that extent, and that the husband is nevertheless liable for damages for refusal or failure to perform it.

This court has repeatedly said that conveyances and contracts to convey the homestead, executed by the husband without his wife joining therein, are not merely voidable, but wholly void. *Barton v. Drake*, 21 Minn. 299; *Law v. Butler*, 44 Minn. 482, (47 N. W. Rep. 53.) It is true, however, as counsel for plaintiffs says, that the only point involved in any of these cases, and the only one really decided, was that such a contract did not bind the land; the question now before us never having been squarely presented or decided.

But, notwithstanding some respectable authority to the contrary, it seems to us that to hold that a person is liable in damages for the nonperformance of a contract which he is under no legal obligation to perform would be illogical, and without analogy or precedent in the law. The very proposition involves a legal inconsistency. We think that on legal principles such a contract must be held void for all purposes, and not to constitute the basis of any action against the obligor.

There are also strong practical considerations in favor of this view. While it is true, as counsel suggests, that to hold the husband liable for damages would not deprive him or his family of their homestead, yet to force him to the alternative of securing his wife's signature to the conveyance, or of being mulcted in damages for not doing so, and to place the wife in the dilemma of either having to sign the deed or see her husband thus mulcted in damages, might, and naturally would, often indirectly defeat the very object of the statute.

There is nothing unjust to the obligee in holding such a contract absolutely void for all purposes. He is bound to know the law, and he always has actual notice, or the means of obtaining actual

notice, of the fact that the land with which he is about to deal is a homestead.

It does not follow, however, where such a contract includes lands other than the homestead, that it is also void as to such other lands. A contract to convey a homestead, executed by the husband alone, is not illegal in the sense of being prohibited as an offense. The illegality is not that which exists where the contract is in violation of public policy or of sound morals, or founded on an illegal consideration, which would vitiate the whole instrument. The sole object of the statute was to prevent the alienation of the homestead without the wife's joining in the conveyance or contract. The policy of the law extends no further than merely to defeat what it does not permit. It merely withholds from the husband the power to alienate the homestead in that way,—in other words, provides that the homestead is not grantable in that way; and it was never held that the whole grant would be void, merely because a part of the land was not grantable. *Danforth v. Wear*, 9 Wheat. 673; *Patterson v. Jenks*, 2 Pet. 216-235; *Wallace v. Harris*, 32 Mich. 380-399; Poll. Cont. 264.

The contract in suit was valid as to lands other than the homestead, and hence that part of the answer demurred to constituted only a partial defense. But a party has a right to set up a partial defense, and the demurrer was properly overruled.

Order affirmed.

(Opinion published 56 N. W. Rep. 817.)

JAMES SLOCUM, JR., *et al.* vs. EDWARD B. BRACY *et al.*55 249  
85 100

Argued Oct. 25, 1898. Affirmed Nov. 13, 1898.

No. 8175.

**Contract to convey is fulfilled when a deed is accepted.**

Where a deed has been accepted as full performance of an executory contract to convey real estate, the contract is merged in the deed, upon which alone the rights of the parties thereafter rest; and, in case the deed contains no covenants, and there be no ingredient of fraud or mistake of fact, the grantee cannot recover back the consideration paid because of failure of title.

**Although the deed accepted varies from the one contracted for.**

And this is so although the deed thus accepted varies from that stipulated for in the contract, as where the vendee accepts the deed of a third party in lieu of the deed of his vendor.

**Burden of proof of acceptance.**

But the deed of the third party not being what the contract called for, the burden is upon the vendor to prove that it was accepted as performance of his contract. It would also be competent for the vendee to prove by parol that it was not accepted as performance of the contract, or only accepted as such conditionally. Such evidence would not contradict the terms of the deed, or tend to prove that it was not to be operative as a conveyance according to its terms.

**Evidence considered.**

*Held*, however, that the evidence in this case conclusively proved that the deed of the third party was unconditionally accepted as performance of the vendor's contract to convey.

Appeal by plaintiffs, James Slocum, Jr., and Amelia M. Slocum his wife, from an order of the District Court of Carver County, *Francis Cadwell, J.*, made January 23, 1893, denying their motion for a new trial.

On September 12, 1888, plaintiffs made a contract with defendants, Edward B. Bracy and O. T. Letcher, by which plaintiffs sold and transferred to defendants a stock of goods, store and platform scales at Norwood, Minnesota, valued at \$14,300, and defendants agreed to convey to plaintiffs within thirty days thereafter by good and sufficient deeds in fee, clear of all incumbrances, seven quarter sections (1,120 acres) of land described in the contract and

situated in South Dakota, valued at \$8 per acre (\$8,960) and pay the balance in cash. Among the Dakota lands was the northwest quarter of section twenty six (26), T. 104, R. 62, in Davison County, for which Jonas R. Learned then held the final receipt of the Receiver of the Local Land Office of the United States, but the patent therefor had not been issued. At the request of defendants, Learned and wife conveyed this quarter section to the plaintiff, James Slocum, Jr., by quitclaim deed and the deed was accepted by plaintiffs as part performance of the contract. In all other respects the contract was performed by the parties thereto as stipulated therein. The United States afterwards cancelled the Receiver's receipt for fraud in obtaining it and refused to issue a patent for this quarter section. The plaintiffs brought this action in 1892 upon the contract to recover \$1,280 and interest for failure to convey this quarter section. The defendant Bracy only was found and served with process. He answered that the quitclaim deed from Learned and wife was accepted by plaintiffs in performance of the contract to convey that quarter section and denied the other allegations of the complaint. The issues were tried September 21, 1892. When the plaintiffs' evidence was all in, the Court dismissed the action, saying; "As I view the case now I am satisfied that defendant's motion to dismiss must be sustained for the reason that no damages have been proved." Plaintiffs excepted, moved for a new trial and being denied appeal.

*Fletcher, Rockwood & Dawson, for appellants.*

A quitclaim deed for one hundred and sixty acres of the Dakota land executed by Learned was offered by the defendants to plaintiffs. This deed the plaintiffs recorded. But neither Learned nor defendants ever had any title to the land. The plaintiffs offered to prove that it was not accepted as performance, but the Court ruled that the burden was upon the defense to show that it was accepted as a performance. When plaintiffs' evidence was all in, the Court dismissed the action on the ground that plaintiffs' damages were not shown.

The contract was evidence of the value of the land, and it was admitted without objection; likewise the quitclaim deed of Learned, which defendants delivered to plaintiffs. *Donlon v. Evans*, 40 Minn.

501; *Bennett v. Phelps*, 12 Minn. 326; *White v. Street*, 67 Tex. 177.

Even if no value were shown, the presumption is that the land has some value and plaintiffs should recover nominal damages. *Marcy v. New Hampshire Fire Ins. Co.*, 54 Minn. 272.

Defendants' objections were all based upon the assumption that the obligations of the contract were merged in the deed and that the gist of plaintiffs' action was to engraft obligations upon the deed itself, or to prove an oral contract contemporaneous with the deed. Plaintiffs' cause of action was simply for failure of the defendants to perform the original written contract. *Doulon v. Evans*, 40 Minn. 501; *Keyes v. Minneapolis & St. L. Ry. Co.*, 36 Minn. 290; *Reynolds v. Franklin*, 39 Minn. 24.

In the absence of evidence as to the title, the burden was upon the defendant to show that Learned had a good title. The general rule is that the burden is upon the party asserting the affirmative. *Cornell v. Andrus*, 36 N. J. Eq. 321; *Breckinridge v. Todd*, 3 T. B. Mon. 52; *Wade v. Greenwood*, 2 Rob. (Va.) 474; *Smith v. Pearson*, 44 Minn. 397.

*Edgerton & MacLay*, for respondent.

The plaintiffs waived all objections to the quitclaim deed from Learned and finally settled the whole matter April 6, 1890.

The plaintiffs' own testimony is that they received the quitclaim deed and recorded it and had it still in their possession at the time of the trial. There could be no clearer proof of acceptance and such acceptance could not be conditional. The delivery of a deed is absolute, when made to the grantee, and title vests immediately, even against the expressed intention of the parties. This acceptance ended their right to sue on the contract.

The contract of sale and the alleged parol agreement were merged in the quitclaim deed. *Whittemore v. Farrington*, 76 N. Y. 452; *Cable v. Foley*, 45 Minn. 421; *Clark v. Lindeke*, 44 Minn. 112; *Bruns v. Schreiber*, 43 Minn. 468; *McLean v. Nicol*, 43 Minn. 169; *Fritz v. McGill*, 31 Minn. 536; *Pearce v. McGowan*, 35 Minn. 507; *Whitney v. Smith*, 33 Minn. 124; *Thwing v. Davison*, 33 Minn. 186; *Thompson v. Libby*, 34 Minn. 374.

In the present case the law implies that when the quitclaim deed



was accepted, it was a fulfillment of the contract to convey and such presumption is conclusive. The legal effect of the deed as a consummation of the prior contract cannot be altered by parol. *Bull v. Willard*, 9 Barb. 641; *Long v. Hartwell*, 34 N. J. Law, 116; *Houghtaling v. Lewis*, 10 Johns. 296; *Howe v. Barker*, 3 Johns. 506; *Isett v. Lucas*, 17 Ia. 503; *White v. Boyce*, 21 Fed. R. 228; *Warren v. Jacksonville*, 15 Ill. 236.

We respectfully submit that although the lower Court may have been wrong in placing the dismissal of the action upon the ground stated, yet the action should have been dismissed upon the grounds named by defendant in his motion of dismissal made at the close of the plaintiffs' evidence, and therefore the dismissal was proper.

MITCHELL, J. This was an action to recover the consideration paid for land which defendants contracted to convey to plaintiffs by "a good and sufficient deed, free of all incumbrances," but which it is alleged they had failed to convey, and were unable to convey, by reason of want of title.

Stripped of immaterial matter, the answer was that defendants had performed by procuring a quitclaim deed of the land to plaintiffs from a third party whose title "rested upon final receipts of the receiver of the United States land office," which deed plaintiffs had accepted as full performance of defendants' contract.

The reply admitted the execution of this quitclaim deed, but denied that plaintiffs had accepted it as performance of the contract, and alleged that, at the time of the execution of the deed, it was agreed between plaintiffs and defendants that "it should not be deemed performance of the contract, except in the event that a patent for the land should be issued by the government;" that the entry of the land was canceled by the government, and hence no patent issued, by reason whereof there was an entire failure of title.

No rule of law is better settled than that, where a deed has been executed and accepted as performance of an executory contract to convey real estate, the contract is *functus officio*, and the rights of the parties rest thereafter solely on the deed. This is so although the deed thus accepted varies from that stipulated for in the contract, as where the vendee accepts the deed of a third party in lieu of the deed of his vendor; and as, in the sales of land, the law re-

mits the party to his covenants in his deed, if there be no ingredient of fraud or mistake in the case, and the party has not taken the precaution to secure himself by covenants, he has no remedy for his money, even on failure of title. What is said in *Donlan v. Evans*, 40 Minn. 501, (42 N. W. Rep. 472,) seems to conflict with this doctrine, but this question was not involved in that case. The complaint alleged false and fraudulent representations as to the title of the grantor in the deed. The court found this allegation to be true, and the evidence abundantly sustained the finding. This fraud was the real gist of the cause of action in that case.

The deed of a third party not being what the executory contract called for, the burden was on the defendants, as the trial court correctly held, to prove that plaintiffs accepted the deed in performance of the contract. But it was not necessary to prove that plaintiffs expressly agreed, in so many words, to accept it as performance; the fact might be proved by the acts of the parties, and other circumstantial, but equally persuasive, evidence.

The evidence is conclusive that this quitclaim deed was executed and unconditionally delivered to plaintiffs with reference to this executory contract; also that plaintiffs accepted it as a conveyance with reference to that contract and in lieu of a deed from the defendants, and then proceeded to settle and close up the transaction on that basis. This certainly made out at least a *prima facie* case for the defendants that the deed was accepted in performance of the contract. If there were any conditions attached to this acceptance, the burden was then cast on plaintiffs to prove it.

There would be a very clear distinction (apparently not fully kept in mind by counsel) between plaintiffs merely accepting the instrument as a conveyance and their accepting it as performance of defendants' contract.

We therefore think that it would have been competent for plaintiffs to have proved by parol the allegation of their reply that their acceptance of the deed as performance of defendants' contract was only conditional. Such evidence would not contradict the terms of the deed, or tend to prove that it was not to be operative as a conveyance according to its terms. But the defect in plaintiffs' case is that they produced no sufficient evidence to rebut defendants' evidence that the deed was accepted as performance of the executory

contract, or to show that there was any such condition attached to its acceptance, or such as is alleged in the reply.

The only evidence offered having the least tendency in that direction was that, after the entry of the land was canceled, the defendants made some attempts to get a rehearing before the secretary of the interior, in order to get the entry reinstated. While this fact might be of some weight as corroborative of some other and better evidence, yet, standing alone, it amounted to nothing.

Therefore, in our opinion, the evidence as it stood conclusively showed that plaintiffs accepted this quitclaim of a third party as performance of defendants' executory contract to convey, and hence, there being no element of fraud or mistake in the transaction they were not entitled, under the rules of law already referred to, to recover the consideration paid because of failure of title. On this ground the action was properly dismissed, and whether the trial court assigned the right reason is not material.

Order affirmed.

(Opinion published 56 N. W. Rep. 826.)

Application for reargument denied November 21, 1893.

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GILES GILBERT *vs.* MARY F. EMERSON *et al.*

Submitted on briefs Oct. 20, 1893. Reversed Nov. 13, 1893.

No. 8536.

The outermost lots in a townplat of shore and bordering shallows, take the riparian incidents.

R., being the owner of the land fronting on the waters of the bay of Duluth known as "Rice's Point," platted it into blocks and streets, extending the plat a distance of several blocks beyond the actual shore line, out into the shallow water, but not out to the line of navigability. He then conveyed, according to the plat, the original shore block to A., and all the water blocks in front of it to B. *Held*, (1) that A.'s rights were limited to the lines of the original shore block as indicated on the plat, and that he acquired no appurtenant riparian rights in the unplatted space between the outermost platted blocks and the line of navigability; (2) that the plat, on its face, showed an intention that the outer-

55	254
57	293
55	254
60	63

most platted blocks should be deemed the shore blocks, with all the riparian rights in the water, and land under the water, in front of them, usually incident to a riparian estate; and that, after conveying these blocks, R. had no proprietary interest in the unplatted space in front of them.

Appeal by plaintiff, Giles Gilbert, from a judgment of the District Court of St. Louis County, *Charles L. Lewis, J.*, rendered September 19, 1893, decreeing that plaintiff is not, and that defendant George C. Howe is, the owner of the unplatted submerged land in controversy.

Appeal also by defendants, Mary F. Emerson and Charles H. Eldridge, from the same judgment decreeing that they have no title, estate or interest in the same unplatted submerged land.

Plaintiffs brought this action under 1878 G. S. ch. 75, § 2, to determine the adverse claims of defendants, Mary F. Emerson, Charles H. Eldridge, George C. Howe and others, in and to the unplatted submerged land lying in front of his block No. 159 of Rice's Point and between the block and the dock line which was established in 1887, some distance out in Duluth Bay in front of it.

Defendant Howe answered that Orrin W. Rice received a patent from the United States for all the land on Rice's Point, a peninsula lying between the Bay of Duluth on the east and St. Louis Bay on the west. That on December 31, 1858, Rice platted the dry land and the submerged land on the east covered by shallow water, into blocks and streets. That through several mesne conveyances the plaintiff had become the owner of block No. 159, the outermost block on Rice's plat, and lying wholly in the shallow water of the Bay of Duluth. That Block No. 85 was partly in the shallow water and partly on the dry land and embraced the natural shore line. That this block No. 85 was sold by Rice and through several mesne conveyances became the property of the defendants Emerson and Eldridge as tenants in common. That afterwards Rice died intestate and this defendant Howe has since acquired from his heirs all the title, right and interest which Rice had at his death in and to the unplatted land covered by shallow water lying in front of plaintiff's block No. 159, and between it and the dock line established in 1887. A copy of the map of Duluth showing the platting, dock lines and natural shore, was attached to the answer.

Defendants Mary F. Emerson and Charles H. Eldridge also answered stating the same facts. They claimed to own this unplatted submerged land in question by virtue of their ownership of block No. 85 embracing the natural shore, notwithstanding the intervening Block No. 159 belonged to the plaintiff. The other defendants made no claim. On receiving these answers the plaintiff without replying moved the Court, August 28, 1893, on notice, for judgment on the pleadings. The trial Court held that on the facts stated in the answer defendant Howe owned this unplatted submerged land and judgment was entered accordingly. Plaintiff and the defendants Emerson and Eldridge severally appeal. Both appeals were argued together in this Court.

*Billson & Congdon, for appellant Gilbert.*

The right to this unplatted space in front of his block is claimed by the plaintiff by virtue of his ownership of the outermost of the platted blocks. The defendants, Emerson and Eldridge claim the right to it as still incident to their ownership of the block which was originally, at this point, the shore of the bay; their theory being that the riparian rights originally incident to their block were curtailed by the plat, only as to the area covered by the platted blocks, thus leaving still incident to their original shore block any residuum of unplatted space lying inside the dock line. The claim of the defendant, George C. Howe, is based upon his deed from the heirs of Orrin W. Rice, and rests upon the theory that where a riparian owner plats his land and extends his plat out into the adjacent shallow waters, he still retains, after selling all his platted lots and blocks, the right to improve and occupy, as against any or all of his grantees, any space which may lie beyond the boundaries of his plat and within any dock line that may be subsequently established by public authority.

Had it been expressly recited upon the face of the plat that the outside row of platted blocks should be regarded as the shore of the bay; or that all platted blocks should be deemed already filled in and regarded as dry land as ultimately contemplated by the plat; or that the outside blocks should always have direct contact with and access to the waters of the bay, which by the plat they were shown to enjoy; or that such blocks in analogy to the general rule

respecting premises apparently abutting upon a highway of any kind should carry with them the interests of the vendor in the adjacent highway; or that as against his grantees of such blocks, Rice, the maker of the plat, waived or estopped himself from claiming rights of occupancy beyond them, or from denying that such blocks had, as by reference to the plat they appeared to have, direct access to the navigable waters in front of them; the rights of the plaintiff would have been too clear to admit of doubt.

If on the contrary it had been similarly recited that the right of occupancy in any space between the plat and the point of navigability should remain in Rice, or that such residuary right should remain and pass as incident to the original shore block, the right of Howe in the one case, and of the remaining defendants in the other, would have been equally clear. In the absence of any of these express stipulations, it remains for the Court to say which, if any of them, is fairly implied from the character of the plat and all the circumstances of the transaction.

The sole function of the Court is to determine which of these several possible meanings of the plat it is fair to presume was present in the minds of the parties. The question is therefore one of construction of contract, particularly with reference to the reasonable implications from the plat. The question is pre-eminently a practical one for it concerns solely the mental operations of practical men engaged in a business transaction. If by the application of any technical rules or artificial reasoning, the Court should be so unfortunate as to charge the transaction with a result the opposite of that which under all the circumstances was naturally contemplated by the parties, it would be an apparently unnecessary injustice.

The plat fairly implies that the outermost platted blocks should permanently enjoy direct access to the water and all parties buying or selling lots by reference to the plat should be presumed to have acted upon that understanding. *Watson v. Peters*, 26 Mich. 508; *Richardson v. Prentiss*, 48 Mich. 88; *Goodsell v. Lawson*, 42 Md. 349; *Mariner v. Schulte*, 13 Wis. 775.

The defendants who own the original riparian block have no claim upon the unplatted space in controversy. The case of *Gilbert v. Eldridge*, 47 Minn. 210, would seem to substantiate this proposition.

*Edward Fuller*, for appellants Emerson and Eldridge.

*Wm. B. Phelps, for respondent Howe.*

Under the decisions of this Court submerged land in the Bay of Duluth has the same characteristics as the upland, subject however to the public right of navigation, and is governed by the same general rules of law as other realty. *Gilbert v. Eldridge*, 47 Minn. 210; *Brudshaw v. Duluth Imp. Mill Co.*, 52 Minn. 59.

It is conceded that Rice became the owner of this submerged area about the land by him entered. It was and is covered by shallow water and is within the present dock lines legally established. Riparian rights belong and are incident to the abutting shore. *Lake Superior Land Co. v. Emerson*, 38 Minn. 406; *Hanford v. St. Paul & D. R. Co.*, 43 Minn. 105.

No one purchasing a shore block such as Block 85 would understand that his rights extended beyond the middle of the streets surrounding this block. The unplatted space claimed by the parties to this action could not be appurtenant or incident to a shore block from which it is separated by a number of intervening blocks and streets. The intention to cut off riparian rights from the original shore is evident from platting the submerged area in front of the shore. Emerson and Eldridge have no interest or title whatever, in or to, this unplatted space because of their ownership of Block 85.

When Rice received his patent from the general government the space covered by Block 159 or his rights over this space came to him as incident and appurtenant to his title to the shore. The Court is now asked to hold that the rights over this unplatted space which were originally incident and appurtenant to the shore, have since attached to Block 159, which was itself an incident and appurtenant of the shore. Plaintiff has not cited any authority for this claim, or any in which it has been held that an incident attaches to an incident. On the contrary, the authorities are to the effect that an incident can never attach to an incident. A shadow must have its substance and we will look in vain for the shadow of a shadow. Rice owned the unplatted space in question. He had a right to plat, use or convey it as he saw fit, and Howe succeeded to all of Rice's rights. In *Gilbert v. Eldridge*, 47 Minn. 210, it was held, that to a tract of land having a navigable body of water as one of its boundaries, riparian privileges attached; but if such tract were bounded by

right lines not coincident with the shore, such lines would be regarded as excluding such privileges. In the case of the *City of Duluth v. St. Paul & D. R. Co.*, 49 Minn. 201, this same rule of construction was followed. Following the doctrine of these cases, the plaintiff's rights do not extend beyond the limits of his water block. The fact that the space beyond Block 159 was unplatted could not be construed as evidencing an intention to bestow it upon the owner of that block. Rice had the right to treat this property as he saw fit. No law required him to plat it all at one time.

The Court below found that the unplatted space was cut off and disassociated from the shore by the platting and ceased to be incident and appurtenant thereto, and did not thereby become incident or appurtenant to the adjacent platted area and that defendant Howe is the sole and absolute owner of these rights.

MITCHELL, J. This is another of the familiar series of controversies over titles and riparian rights, growing out of the fact that Orrin W. Rice, the original owner of a peninsula fronting on the waters of the bay of Duluth, known as "Rice's Point," in platting his land into lots, blocks, and streets, extended the plat for a distance of several blocks beyond the shore line out into the shallow water. *Gilbert v. Eldridge*, 47 Minn. 210, (49 N. W. Rep. 679;) *Bradshaw v. Duluth Imp. Mill Co.*, 52 Minn. 59, (53 N. W. Rep. 1066.)

Rice did not, however, plat out to the line of navigability, and hence an unplatted space was left between the outermost blocks and the navigable waters. It is this unplatted space which is the subject of the present controversy.

After platting the land, Rice conveyed the original shore block (85) to the grantors of defendants Emerson and Eldridge, and conveyed to the grantors of plaintiff all the water blocks in front of block 85, including those fronting on the unplatted space referred to. Years afterwards, Rice's heirs conveyed the unplatted space to the defendant Howe.

Plaintiff claims the right to occupy this unplatted space by virtue of his ownership of the outermost blocks fronting on it; his contention being that the plat clearly shows on its face that it was intended that these blocks should permanently enjoy access to the water,—in short, that they should be the "shore blocks,"—and that,



as such, the riparian rights usually appurtenant to the shore land should attach to them.

Defendants Emerson and Eldridge claim the right to the unplatted space as appurtenant to their ownership of the original shore block; their theory being that the riparian rights originally incident to the shore land were curtailed by the plat only as to the land covered by the platted blocks, thus leaving still incident to the original shore block the unplatted space out to the point of navigability.

Defendant Howe bases his claim upon the deed from Rice's heirs, upon the theory that, where a riparian owner extends the plat of his land out into the adjacent shallow water, he still retains, after selling all his platted water blocks, the right to improve, as against his grantees, all that lies beyond the boundaries of the plat out to the line of navigability.

It is the settled doctrine of this court that the right of the riparian proprietor upon navigable waters to reclaim, improve, and occupy submerged lands out to the line of navigability may be separated from the shore land, and transferred to and enjoyed by persons having no interest in the original shore. We have also held, with reference to this very property, that platting the land into separate and distinct parcels or blocks, out into the shallow water beyond, in front of the shore block, clearly indicated an intention to disassociate the two, and hence that the grantee of the shore block would acquire no interest in the water blocks in front of it. This is conclusive against the claim of defendants Emerson and Eldridge, for if the platting in that way indicated an intention that the grantee of the original shore block should have no right in the water, or the land under the water, included in the platted blocks in front of it, it with equal or even greater force negatived any intention that he should have any rights in the water, or land under it, outside of the intervening platted blocks, which he could not, under the circumstances, use as incident to the original shore block. In brief, the intention is clearly indicated that the rights of the grantee of that block were to be limited by the boundary lines as indicated on the plat.

We have never before had occasion to directly pass upon the exact question at issue between plaintiff and defendant Howe; but we

think that an application of the principles announced in our former decisions necessarily leads to its determination in favor of the contention of the plaintiff.

The principle on which all our decisions on the subject have proceeded is that the question is one of intention, as indicated by the plat, with reference to which all the conveyances were made. This plat, as we think, clearly implies that the outermost platted blocks should be and remain the riparian or shore blocks, and, as such, have all the riparian rights in and to the water, and the land under the water, in front of them, which any riparian or shore estate has. This would be the impression which would be inevitably produced on the mind upon a mere inspection of the plat.

Where a party conveys a parcel of land bounded by water, it will never be presumed that he reserves to himself proprietary rights in front of the land conveyed. The intention to do so must clearly appear from the conveyance; and the mere fact that the boundary of the lot conveyed is indicated by a line on the plat will not limit the grant to the lines on the plat, or operate to reserve to the grantor proprietary rights in front of the lot. *Watson v. Peters*, 26 Mich. 508. Had the blocks conveyed to plaintiff been original shore blocks, (with no block platted out in the water in front of them,) or had Rice, before conveying these outermost water blocks, reclaimed and filled them up, there could have been no question but that the grantees would have acquired all the riparian rights in the water, and land under water in front of them, usually appurtenant to shore land.

But the platting of these water blocks, and conveying them with reference to the plat, manifestly contemplated reclaiming them and filling them in, or otherwise improving them for use; and we cannot see what difference it makes whether this had been done before Rice conveyed, or was only in contemplation. It seems to us that the plat contemplates upon its face, as clearly as words could express it, that the exterior line of these outermost blocks was to be treated as the shore line, and that the rights usually appurtenant to a riparian estate would attach to those blocks. All the supposed legal objections to this view are more speculative and specious than practical or sound.

On the appeal of defendants Emerson and Eldridge, that part of the judgment appealed from is affirmed, and on the appeal of plaintiff that part of the judgment appealed from is reversed, and the cause remanded, with directions to the court below to render judgment in favor of plaintiff.

(Opinion published 36 N. W. Rep. 818.)

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HUNTRESS-BROWN LUMBER Co. *vs.* M. G. WYMAN *et al.*

Argued Nov. 8, 1893. Affirmed Nov. 13, 1893.

No. 8457.

**New trial for accident and surprise.**

*Held*, that the court was justified in granting a new trial on the ground of "accident or surprise which ordinary prudence could not have guarded against."

Appeal by defendants, M. G. Wyman and over one hundred others, from an order of the District Court of St. Louis County, *Charles L. Lewis, J.*, made June 3, 1893, granting a new trial.

Huntress-Brown Lumber Company, a corporation, brought this action for an accounting as to the proceeds of a large quantity of lumber manufactured by it and on which the appellants had liens for labor. The lumber had been delivered to John J. Costello, as trustee for all parties in interest, to sell it, pay expenses and the liens of the defendants and account to plaintiff for the balance. Costello was joined as a defendant. He soon after died testate and his widow proved the will and she and John T. Lucas received letters testamentary. Lucas resigned and the widow was substituted defendant April 15, 1893, in place of her deceased husband. The issues in the action were soon after brought to trial before the Court. Findings of fact were made and judgment ordered charging the estate with \$3,643.20 net proceeds of the lumber in Costello's hands at his death and ordering it distributed *pro rata* among the laborers upon their liens. The executrix moved for a new trial on the ground of accident and surprise which ordinary prudence could not have

guarded against. Numerous affidavits were read at the hearing. The Court granted the motion and the lien claimants appeal.

*D. M. De Vore and E. J. Hill, for appellants.*

*O. W. Baldwin, for respondent.*

MITCHELL, J. Without attempting to discuss at length the contents of the affidavits on the motion for a new trial, we would simply say that we are satisfied from an examination of the record that, in view of all the facts,—as, for example, the death of Costello, the original defendant, the resignation of the active executor of his estate, the ignorance of Mrs. Costello, the only remaining resident executor, of the exact situation of the cause, the fact that Costello was only trustee for another person, who was not a party to the suit, and the probable consequent misunderstanding as to which party should defend the action, coupled with the additional fact that so short a time intervened between the substitution of the executors as parties and the trial of the action,—taken all together, presented a case peculiarly addressed to the sound discretion of the trial court as to whether the parties had not made out a case of accident and surprise from the consequences of which they ought to be relieved, and permitted to try the action on its merits. We fail to see any abuse of discretion under the circumstances in the court's granting a new trial.

The contention of appellants that they were entitled to judgment on the pleadings is not correct; for if, as the answer alleges, as we construe it, the actual possession and control of the property was turned over to Costello before appellants levied on it, it is immaterial whether the original agreement between plaintiff and Costello constituted a bailment or a conditional sale; and, even if it constituted a conditional sale, the failure to file the contract would not render it void as to appellants if they had actual notice of the state of the title at the time of the levy.

Order affirmed.

(Opinion published 56 N. W. Rep. 896.)

**E. P. TRAUTWEIN vs. TWIN CITY IRON WORKS.**

Argued Nov. 8, 1893. Affirmed Nov. 14, 1893.

No. 8874.

**Former suit not a bar.**

Where a note is given for the price of a chattel sold with warranty, a recovery for a breach of the warranty does not affect the right to recover on the note.

Appeal by plaintiff, E. P. Trautwein, from a judgment of the District Court of Hennepin County, *Henry G. Hicks, J.*, entered May 13, 1893.

*George H. Benton*, for appellant.

*George F. Edwards*, for respondent.

GILFILLAN, C. J. The action is on a judgment in favor of plaintiff against defendant recovered in the circuit court for the county of Bollinger, in the state of Missouri. It appears that defendant sold to plaintiff certain mill machinery, warranting the quality or capacity thereof, and for the purchase price, or for part of it, plaintiff executed to defendant his promissory note. This defendant brought, in said circuit court, an action against this plaintiff to recover upon the note, and in that action the defendant (this plaintiff) set up a counterclaim upon an alleged breach of the warranty. It appears that, by the statute of Missouri, a plaintiff may dismiss his action, even where a counterclaim has been pleaded by the defendant, but in such case the dismissal shall not affect the counterclaim, as to which the action shall proceed as though originally brought upon it.

Before a trial, the plaintiff in that action, by leave of court, dismissed his action, and withdrew his cause of action, and the action stood for trial on the counterclaim alone, and the defendant in that action recovered on the counterclaim the judgment to recover upon which this action is brought, in which this defendant sets up a counterclaim on the note. The court below allowed that counterclaim.

The appellant seems to think that, in some way, the determination of the counterclaim in the Missouri action involved and disposed of

the right to recover on the note. But the two causes of action were independent, in the sense that, in the absence of any statute to the contrary, an action might be brought and recovery had on one without reference to the other. They accrued at different times—that on the note at the time when, by its terms, it fell due; that on the warranty, instantly upon the sale. A recovery on the note would not affect the right to recover for the breach of warranty, and *con-  
verso*.

Judgment affirmed.

(Opinion published 56 N. W. Rep. 750.)

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HENRY M. LITTLE vs. S. GEORGE COOK *et al.*

Argued by appellant, submitted on brief by respondent, Oct. 26, 1893. Reversed  
Nov. 14, 1893.

No. 8255.

Hearsay evidence.

Certain evidence *held* to be hearsay, and therefore inadmissible.

Appeal by plaintiff, Henry M. Little, from an order of the District Court of Hennepin County, *William Lochren, J.*, made March 23, 1893, denying his motion for a new trial.

Frank E. Little had the legal title to a lot on First Avenue North in Minneapolis with a warehouse thereon. It was incumbered by mortgage given by the former owner to Charles H. Maxcy for \$20,000 and interest at seven per cent. a year payable semiannually. Frank E. Little leased the property to the Star Elevator Company for \$1,500 a year and then conveyed it September 22, 1888, to Joseph E. Thwing subject to the mortgage. Thwing conveyed it December 31, 1888, to the plaintiff subject to the mortgage. The defendants, S. George Cook and Charles H. Maxcy were partners in business and they with the permission of the plaintiff collected the rents to the amount of \$3,000. Plaintiff claims that these rents were to be applied upon the mortgage held by Maxcy, but that Maxcy foreclosed the mortgage and bid in the property for the full amount of the mortgage

debt and interest, without applying thereon any of the rents collected. Plaintiff brought this action to recover of Cook and Maxcy the rents they had collected. They answered that Frank E. Little was indebted to them \$10,000 on his notes unsecured. That he in fact owned the lot and warehouse, but conveyed it to Thwing and had Thwing convey it to his brother, the plaintiff, to hold the title in trust for him and conceal it from his creditors. That he and plaintiff both agreed that the rents should be applied upon the notes for \$10,000 and not upon the mortgage. They alleged that the money collected had been so applied. On the trial, plaintiff was a witness and denied that he ever consented that the rents should be applied upon his brother's debt. Maxcy testified that he did. Maxcy was also asked by defendants to testify to a conversation he had with Frank E. Little. To this plaintiff objected, but was overruled and he excepted. Maxcy then testified that Frank E. Little told him the property stood in his brother's name, but was his, and gave witness an order for the rents to apply on his notes and asked him not to sue on them. Afterwards, Plaintiff called Frank E. Little as a witness and he denied having this conversation. The Court made findings and ordered judgment for defendants. Plaintiff moved for a new trial but was denied and he appeals.

*C. J. Cahaley and James D. Shearer, for appellant.*

*Wilson & Vanderlip, for respondents.*

GILFILLAN, C. J. One Frank E. Little was the owner of certain real estate in Minneapolis, subject to a mortgage, and executed to the Star Elevator Company a lease upon it. He then conveyed to one Thwing, and Thwing conveyed to plaintiff. Frank E. Little gave to defendants an order, assented to by plaintiff, upon the tenant requesting it to pay the rent to the defendants. Plaintiff gave two similar orders, the three covering the rent for two years, amounting to \$3,000, and upon them the rent was paid to defendants.

Plaintiff claims that the orders were given and the rents collected under an agreement between him and defendants that they should pay the rents collected to satisfy the interest upon the mortgage.

Defendants claim that the orders were given under an agreement between them and Frank E. Little, assented to by plaintiff, by which

the defendants were to receive the rents, and apply them upon indebtedness due them from Frank E. Little.

On the question of how the rents, when collected, were to be applied, the evidence was directly contradictory, so that it was proper for either party to prove facts that would make his version of the arrangement the more reasonable and probable. For that purpose it was proper for defendants to prove, by parol, if need be, that plaintiff held the legal title to the property for the benefit of Frank E. Little, for his use; not to establish a trust, but to show that between plaintiff and Frank E. Little it was understood that the latter might appropriate the rents.

But the court below erred in permitting defendants to prove the declarations to that effect of Frank E. Little. There was nothing in the case to remove these from the rank of hearsay.

Order reversed.

(Opinion published 56 N. W. Rep. 750.)

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ROBERT L. SCOVELL *vs.* T. FRANK UPHAM *et al.*

Submitted on briefs Nov. 1, 1893. Affirmed Nov. 14, 1893.

No. 8317.

**Findings sustained by the evidence.**

Evidence *held* to sustain the findings of fact.

**Facts stated, on which a commission was earned.**

Plaintiff having an applicant for a loan of \$16,000 at six per cent., to be secured on certain real estate, applied to defendants, who agreed that if he would bring the applicant to them, and they should procure and make the loan to him, they would pay plaintiff a commission of one per cent. on the amount of the loan. He sent the applicant to them, and through their efforts a corporation of which they were stockholders and officers made the loan of \$15,000 at seven per cent. *Held*, plaintiff is entitled to the commission, and that it does not affect his right that defendants received no commission for procuring or making the loan.

Appeal by defendants, T. Frank Upham and N. J. Upham, from a judgment of the Municipal Court of the City of Duluth, entered



March 8, 1893, against them and in favor of plaintiff, Robert L. Scovill, for \$167.94.

*Lewis & McManus*, for appellants.

*W. R. Spencer*, for respondent.

GILFILLAN, C. J. The second finding of fact, to which error is assigned that it is not supported by the evidence, might, standing alone, be obnoxious to the objection that it lacks definiteness, and that gauged by the evidence, it is inaccurate; but, taking all the findings together, those faults are removed, and the evidence was such that none of the findings can be set aside.

The facts as found are that plaintiff's brother, desiring to procure a loan of \$16,000 at six per cent. upon the security of certain real estate, applied to plaintiff to procure it for him, and the plaintiff applied to defendants to procure it. It was then agreed between plaintiff and defendants that if he would bring the applicant to them, and if they should succeed in making the loan, they would pay the plaintiff as commissions one per cent. on the amount of the loan. Plaintiff sent his brother to them, and upon their procurement the Duluth Loan, Deposit & Trust Company, a corporation of which defendants were stockholders and officers, made a loan to the brother of \$15,000 on the security of the real estate. How it came that the amount loaned was \$1,000 less than was applied for does not appear. It was undoubtedly a matter of arrangement between the borrower and the defendants on behalf of the party whom they procured to make the loan. It does not appear that any one was dissatisfied because of it. Certainly the defendants could not escape paying plaintiff's commissions on the ground that they and his applicant had agreed to make the amount less than was at first applied for. Nor does it affect plaintiff's right that while the application was for a loan at six per cent. it was made at seven per cent., a rate more favorable to defendants and their lender. The borrower alone could complain of that. Nor does it affect plaintiff's right that the defendants received no commissions for procuring the loan. Their agreement to pay plaintiff a commission was not made to depend on their receiving a commission. It did not affect their contract with him that when they made it, and when he sent the borrower to them, they were as partners in the business of

making and procuring loans, but when they procured this loan they had quit that business as partners, and had become officers of the lender.

Order affirmed.

(Opinion published 56 N. W. Rep. 812.)

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THEODORE H. JOHNSON *vs.* HENRY H. FULLER.

Argued Nov. 6, 1893. Affirmed Nov. 14, 1893.

No. 8539.

**Contract to sell lot construed.**

In a contract to convey real estate, on which \$30 had been paid, the remainder of the price to be paid on delivery of a warranty deed, was this clause: "In case the title shall be ascertained to be unmarketable to such an extent as to warrant the purchaser in refusing the same, and he shall so refuse the same on that ground, the vendor shall not be liable to any damage, and the said sum of \$30, paid by the purchaser, shall be returned to him." Held that, on the title proving unmarketable, the vendee might either fulfill the contract on his part, take a conveyance, and rely on the covenants in it to protect him against defects in the title, or refuse to fulfill, and receive back the \$30,—in effect, to rescind the contract.

Appeal by defendant, Henry H. Fuller, from an order of the District Court of Washington County, *W. C. Williston, J.*, made January 12, 1893, overruling his demurrer to the complaint.

On November 30, 1888, Ida M. Essery made a contract with Henry H. Fuller to sell to him for \$600 the north half of lot one (1) in block twelve (12) of the Town of Wilson in Section twenty T. 30 R. 21 in Washington County. He paid \$30 and was to pay the balance on delivery of a warranty deed. He was to have a reasonable time, not exceeding thirty days, for examination of the title. If it should be found unmarketable and he refused it on that ground, she was to return the \$30 and not be liable for damages. This contract was recorded in the Registry of Deeds of that county. On December 30, 1888, he notified her that he had ascertained that her title was not

good and he refused to take the deed on that ground, and refused to pay the balance of the price. She then offered to return to him the \$30, but he refused to accept it and claimed that she was bound to obtain and convey to him a good title. This she refused to do and sold and conveyed the half lot to the plaintiff, Theodore H. Johnson. He commenced this action and in his complaint stated these facts, set forth a copy of the contract and demanded judgment that the contract and the record thereof be cancelled and the property relieved from the cloud cast on his title thereby. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The trial Court overruled the demurrer and ordered judgment for the plaintiff as prayed in the complaint. From this order defendant appeals.

*Walter L. Chapin, for appellant.*

*Daniel W. Doty, for respondent.*

GILFILLAN, C. J. Action to clear a cloud on title to real estate cast by a recorded contract to convey. The price was \$600; \$30 paid at the execution of the contract, the remainder to be paid on the delivery of the deed. There were these clauses in the contract: "A reasonable time, not exceeding thirty days, is to be allowed for examination of title; and the form of conveyance is to be warranty deed. In case the title shall be ascertained to be unmarketable to such an extent as to warrant the purchaser in refusing the same, and he shall so refuse the same upon that ground, the vendor shall not be liable to any damage, and the said sum of \$30, paid by the purchaser, shall be returned to him."

The defendant, the vendee, deeming the title unmarketable, refused to accept a conveyance, and also refused to receive back the \$30; and he now claims that the contract still remains in force, so that he can compel a conveyance. There could be no damages recovered, for the contract expressly excludes that; and a conveyance is just what he refused to take. His claim is, in effect, that he could refuse to accept a conveyance, and at any time afterwards compel the vendor to make one. The contract certainly did not contemplate any such thing. What it clearly intended was that if, at the end of the thirty days, the title should be unmarketable, the vendee might do either of two things: First, perform the contract, and

take a conveyance, relying on the covenants in it as security against any defects in the title; or, second, refuse to perform, and receive back the money paid on it,—in effect, to rescind the contract. His choice to do one or the other of these would fix the rights of the parties from that time on. Having refused to perform, the vendee's only right was to receive back the \$30.

Order affirmed.

(Opinion published 56 N. W. Rep. 813.)

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ELIZABETH JARMY *vs.* DULUTH STREET RAILWAY CO.

Argued Nov. 2, 1893. Reversed Nov. 14, 1893.

No. 3378.

**Duty of conductor to passengers alighting from street car.**

When a street car stops for passengers to alight, if there is a rush of passengers to get off, crowding and jostling each other, it may be the duty of the conductor to use reasonable efforts to check it, to the end that passengers may not be injured or unnecessarily interfered with in their getting off, but it is not his duty to assist specially any one of the well, able-bodied passengers, unless he sees that one to be in special danger, or in some measure unable to take care of himself.

Appeal by defendant, the Duluth Street Railway Company, from an order of the District Court of St. Louis County, *J. D. Ensign, J.*, made March 23, 1893, granting plaintiff's motion for a new trial after verdict for defendant.

On May 21, 1892, the plaintiff, Elizabeth Jarmy and her daughter rode, from West Duluth to the corner of Superior Street and Fifth Avenue West in Duluth, upon an electric railway car operated by the defendant. Plaintiff brought this action to recover for personal injuries received when alighting from the car. She was a witness on the trial and testified that there was quite a crowd of passengers who got off at this point. That they pushed and jostled her when she was attempting to alight. That another passenger behind her stepped upon the skirt of her dress and she fell on the street and was injured. She asked judgment for \$10,000 damages,

claiming the injuries occurred from negligence of defendant in not restraining and keeping back the persons behind her and in failing to assist her while she was attempting to alight from the car.

At the trial the Judge charged the jury that defendant was not under any obligation to the plaintiff to assist her to alight from the car. The jury returned a verdict for defendant. The plaintiff moved for a new trial and the Court granted it on the ground that whether or not it was the duty of the defendant under the circumstances to assist the plaintiff to alight was a question for the jury and should have been submitted to them. From this order defendant appeals.

*Billson & Congdon*, for appellant.

*Wilson & Wray*, for respondent.

GILFILLAN, C. J. This is an action to recover for a personal injury to plaintiff while she was alighting from one of defendant's cars, in which she had been carried as a passenger. Upon a trial in the District Court the jury rendered a verdict for the defendant. On plaintiff's motion the court granted a new trial, on the ground that one of the instructions to the jury was (as the court concluded on the motion) erroneous. We are satisfied the instruction was right, and it was therefore error to grant a new trial.

The facts, so far as necessary to show the bearing of the instruction, were: Plaintiff and her daughter had been riding in the car, which seems to have been crowded with passengers, and, on arrival at the place where they desired to alight, the car stopped, and they got off,—the daughter first; plaintiff following. When she stepped, or was about stepping, to the ground, she fell and was injured. The cause of her falling, as she claims in her evidence, was that as she was on the rear platform of the car, about to get off, there was what may be called a rush of people behind her and on the platform trying to get off, and in the rush they pushed, crowded, or jostled her off, so that she fell. The testimony of other witnesses would justify the conclusion that there was no rush, no pushing or crowding, and that, if any one jostled her, it was only casually.

The instruction for giving which a new trial was ordered was: "The defendant was not under any obligation to plaintiff to assist her to alight from this car."

It is conceded that, if there was such a rush as plaintiff's evidence indicates, it was the duty of defendant's conductor to use reasonable efforts to check it, to the end that passengers should not be injured nor unnecessarily interfered with in their getting off; and respondent claims that that, or something of that character, is the assistance referred to in the instruction. It means, however, a more particular assistance than that; something to be done for her personally and especially, beyond what might be done for the passengers getting off generally.

For aught that appears, plaintiff was as able to get on and off a street car as anybody. There is no suggestion that she needed assistance, except as the danger caused by the rush she testifies to might make it necessary. If, as indicated by the testimony of some of the witnesses, there was no crowding or pushing,—nothing to interfere with a passenger getting off,—there was no duty on the part of the conductor to assist any well, able-bodied passenger. On the other hand, if, as indicated by her testimony, the rush was such as to interfere with the safety and convenience of those in front desiring to alight, it was his duty to all the passengers about getting off, to give his attention to checking the rush, and it was not his duty to give his attention to assisting any one passenger beyond the others, unless he saw and knew that one to be in especial danger, or to be in some measure unable to take care of herself; and there is no evidence that he had reason to apprehend danger to plaintiff more than to her daughter, or a lady friend with her, or any one of a considerable number who alighted at the same time.

The court did not grant the new trial because of admitting the testimony of Dr. Boyer, nor was it required so to do. The testimony was struck out on plaintiff's motion, and she could not have it struck out, and retain her exception to its admission. The part of his testimony not struck out was not open to the objection that it was a privileged communication.

Order reversed.

(Opinion published 56 N. W. Rep. 818.)

V.55M.—18

**KATE SCOTT vs. HELEN M. WELLS.****Argued Oct. 24, 1893. Affirmed Nov. 14, 1893.**

No. 8472.

**Widow's interest in her deceased husband's real estate.**

The one-third of the real estate which goes to the widow on the death of her husband is, for the purpose of paying his debts, a part of his estate to be administered, so that a license to sell for that purpose "the interest of said estate" in described land, will cover the widow's third.

**Practice in Probate Court in selling real estate to pay debts.**

It is not necessary to go against the widow's one-third separately in proceedings to sell for payment of debts.

Appeal by plaintiff, Kate Scott, from an order of the District Court of Hennepin County, *Seagrave Smith, J.*, made September 8, 1893, sustaining a demurrer to her complaint for partition.

Ansel F. Scott departed this life intestate prior to June 27, 1889. His widow, Kate Scott, was appointed sole administratrix of his estate. On that date she petitioned the Probate Court of Hennepin County for license to sell his real estate to pay his debts. License was granted August 28, 1889, to sell at public sale "the interest of the estate as the same may appear, in lot twelve (12) in Auditor's Subdivision seven (7) in Minneapolis." She sold the property by this description to Mary J. Dean for \$100. Her report of the sale was made and the sale confirmed and on May 13, 1890, she as such administratrix granted and conveyed to the purchaser her heirs and assigns all the right, title and interest of the estate of Ansel F. Scott deceased in and to the lot, subject to a mortgage thereon for \$1,800. Mary J. Dean afterwards sold and conveyed the property to the defendant, Helen W. Wells.

On June 12, 1893, plaintiff claimed to own one undivided third of the lot as the widow of Ansel F. Scott under 1878 G. S. ch. 46, § 3, and that the sale to pay debts did not include the one third interest which she inherited. She brought this action to have this undivided third set off to her in severalty. Her complaint stated

these facts and prayed partition. Defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The Court sustained the demurrer and plaintiff appeals.

*Smith & Smith*, for appellant.

Our contention is that the estate of the widow in her husband's lands, after his death, was not divested by the proceedings in the Probate Court. We concede, for so is the statute, that the widow's interest is subject in its just proportion with other lands of which her husband died seized to the payment of his debts. But we insist that to subject the widow's interest and estate in her deceased husband's land to sale for the payment of the debts of the estate, her interest and estate must be put directly in question in the petition and be the subject of direct adjudication by the Court, and the decree of the Court must direct its sale and to what extent it shall bear the burthen of the debts. The Court must ascertain by its decree what such just proportion is, and only sell that part. This was not done and the sale did not embrace her interest in the land.

The present provision for the wife by the Probate Code, Laws 1889, ch. 46, § 64, is the same as 1878 G. S. ch. 46, § 3. It is nothing more nor less than enlarged dower and we contend it is governed by all the common law rules regarding dower. This is the question in this case. *In re Rausch*, 35 Minn. 291; *In re Gotzian*, 34 Minn. 159; *McGowan v. Baldwin*, 46 Minn. 477; *Dayton v. Corser*, 51 Minn. 406; *Holmes v. Holmes*, 54 Minn. 352.

To divest the widow of her interest in the lands of her deceased husband some direct proceeding must be taken to which she is made a party and in which she has opportunity to contest the claim of creditors, that a sale is necessary to pay the debts. *Laurence v. Miller*, 2 N. Y. 245; *Laurence v. Brown*, 5 N. Y. 394; *Goodwin v. Kumm*, 43 Minn. 403; *Muck v. Watson*, 41 Ia. 246; *Grady v. McCorkle*, 57 Mo. 172; *Crenshaw v. Creek*, 52 Mo. 98; *Owen v. Staten*, 26 Ala. 547; *Covert v. Hertzog*, 4 Pa. St. 145; *Shurtz v. Thomas*, 8 Pa. St. 359; *Sip v. Lawback*, 17 N. J. Law, 442.



*Alfred H. Bright and George B. Young, for the respondent.*

The only question in this case is, what part of lot twelve was sold? Was the entire lot sold, or only two thirds of it? Under the present statute there is in this state no such thing as dower. The wife takes as an heir subject to the debts of the deceased. Until the debts are paid she has no more interest in the real estate of her deceased husband (the homestead excepted) than any other heir at law. If there be no debts or none in excess of the personal property, then she takes one third of all the real estate in fee. If the debts equal or exceed the entire estate, then all real estate must be sold and the wife gets nothing. She stands exactly as the other heirs stand. An examination of the Probate proceedings shows clearly that the understanding of the parties was that the entire property was being sold, not an undivided two thirds.

GILFILLAN, C. J. Ansel F. Scott died intestate, leaving the real estate in controversy, and this plaintiff, his widow, who was appointed administratrix of his estate. As such she filed in the Probate Court a petition representing that it was necessary to sell all the real estate of which the intestate died seised to pay the debts of the estate and expenses of administration, and praying for a license to sell the same. License was thereupon granted to sell "the interest of said estate as the same may appear in" the real estate in controversy, describing it. The sale was made, and, being confirmed, plaintiff executed to the purchaser the usual administrator's deed, conveying "all the right, title, and interest of the estate of said Ansel F. Scott, deceased, in and to" the real estate, describing it. Defendant has succeeded to the interest of the purchaser. Plaintiff brings this action in partition, claiming that, notwithstanding the sale, she is the owner of the undivided one-third of the real estate, which the statute vests in the widow upon the death of her husband.

To state briefly the propositions upon which plaintiff's counsel rest her claim, they are these: The undivided third of the real estate that goes to the widow is no part of the estate of the deceased, and is not covered by a petition for license to sell nor by a license to sell for payment of debts the "interest of the estate" in described lands; that to make a valid sale of the widow's one-

third for payment of debts, "her interest and estate must be put directly in question in the petition, and be the subject of direct adjudication by the court, and the decree of the court must direct its sale, and to what extent it shall bear the burthen of the debts." That is, as we understand it, the proceeding to procure a sale must be expressly against the widow's third, as a separate interest or estate.

In various opinions in this court the estate which a widow takes in the lands of her deceased husband has been to some extent likened to dower. It has been said to be "in the nature of dower," "an enlargement of dower," etc. Such expressions are apt to be misleading. They suggest a likeness between things essentially dissimilar. The only particular in which common-law dower and the estate that now goes to the widow resemble each other is that the same person takes. In the attributes of the two estates, in their quantity and quality, they are entirely dissimilar. But it is immaterial—in this case, at any rate—what the estate is called, whether an estate in dower or of inheritance, and how, as matter of theory, the widow takes, whether as doweress or as heir; for it passes to her "subject, in its just proportion, with the other real estate, to the payment of such debts of the deceased as are not paid from the personal estate." Prob. Code, Laws 1889, ch. 46, § 64. The liability to the debts of the deceased must, of course, be enforced in the Probate Court, and in the administration upon his estate.

Upon the owner's death the title to the real estate of which he dies seised vests at once in his widow and his heir or devisee; but it vests subject to the claims of administration, and to the extent that it is subject to such claims it is a part of the estate in the court for administration, if it be necessary to resort to it for the purpose. It may be called a "secondary fund," the interest of the heir for payment of charges, debts, and legacies, and that of the widow for payment of debts. The administration may seriously diminish, and even exhaust altogether, the share that would otherwise go to the widow, the heir, or devisee. It would seem that any interest in real estate which may be appropriated and entirely used up in administering a particular estate must be a part of that estate for the purpose of administration.

All interests in the real estate subject to payment of debts are in proceedings for that purpose included in and covered by the words "the interest of said estate" in any described lands; therefore the petition and the license and the deed included the plaintiff's interest.

When the different interests in the real estate are equally subject to the charges for which the sale is sought, there is no reason for severing them. Indeed, it must be evident that in such case the interests of all will be best served by selling the entire estate in the particular land.

Order affirmed.

(Opinion published 56 N. W. Rep. 828.)

Application for reargument denied November 24, 1893.

55	278
59	529
55	278
68	148
55	278
84	477

STATE *ex rel.* H. R. SPENCER, Mayor, &c., *vs.* J. D. ENSIGN, District Judge, *et al.*

Argued Oct. 30, 1893. Affirmed Nov. 14, 1893.

No. 8402.

### **Powers of the District Court as to assessments for Parks in Duluth under Sp. Laws.**

Under Sp. Laws 1891, ch. 54, providing for a system of public grounds for the city of Duluth, and the charter of that city, (Sp. Laws 1887, ch. 2, subch. 5, § 10, as amended by Sp. Laws 1889, ch. 19, § 8,) regulating assessments for local improvements, upon the assessments coming before the District Court for confirmation, the court is not limited to considering whether the board of public works exercised their judgment, and whether there was fraud or demonstrable mistake of fact in the assessment, but it reviews, corrects, and revises the assessment.

### **The action of the District Court was valid.**

*State v. District Court*, 33 Minn. 235, followed, to the effect that the provisions in the acts for confirmation by the District Court are valid.

### **An order to reassess ought to specify the defects in the old assessment.**

When, in such case, the court orders a reassessment, the order ought to specify the defects in the assessment, so as to be a guide to the board of public works.

A writ of Certiorari was issued August 30, 1893, by this Court on the relation of Herbert R. Spencer, Acting Mayor of the City of Duluth to *Josiah D. Ensign*, one of the Judges of the District Court of St. Louis County, and to Henry Truelson, James Farrell and Nils Nelson, composing the Board of Public Works of the City of Duluth, requiring them to certify and return to this Court on or before October 3, 1893, the record and proceedings in an assessment of \$28,870.95 made upon certain real estate in that City, said to be specially benefitted by the acquirement of certain other adjacent real estate for park purposes. On September 30, 1893, the said Judge and said Board made return to said writ, setting forth the report of the Board of Park Commissioners of the City of Duluth, upon which the assessment was based, the resolution of the Board of Public Works, notice of assessment, proof of its publication, the Assessment Roll made by said Board, notice of application for confirmation and proof of publication thereof, objections of the owners of lots assessed, the evidence taken and received by the Judge of the District Court of said county on the hearing of the application for confirmation of the assessment, the order of the Court made upon such application refusing to confirm the assessment and an order of that Court refusing to make the previous order more definite and certain and certifying that the same constituted a full and complete transcript of all the proceedings, documents, papers, evidence and files in the matter of such assessment.

*H. F. Greene* and *Henry S. Mahon*, for the relator.

The District Court is not invested with jurisdiction to inquire into the determination of the Board of Public Works as to the specific tracts, lots and parcels of land specially benefitted by the acquisition of lands for a park, or into the amount of such special benefits, or to make a new determination of those facts, or a new assessment. The Legislature can only invest the corporate authorities or a board or tribunal representing the city, such as the Board of Public Works, with the power to determine the amount of the special benefits, if any, and the specific property benefitted by the improvement, and to make an assessment thereon. *Rogers v. City of St. Paul*, 22 Minn. 494; *State ex rel. v. District Court*, 33 Minn. 235.

The power to make assessments for local improvements cannot be vested by the Legislature in any subordinate tribunal or agency, be it a court or otherwise, which is not fully and fairly representative of the municipality, or which has not been voluntarily adopted for the purpose, by the people of the municipality. *People v. Mayor of Chicago*, 51 Ill. 17; *People ex rel. v. Salomon*, 51 Ill. 37; *Harward v. St. Clair, M. L. & D. Co.*, 51 Ill. 130; *Wetherell v. Devine*, 116 Ill. 631; *Cornell v. People ex rel.*, 107 Ill. 372; *People ex rel. v. Common Council of Detroit*, 28 Mich. 228; *State ex rel. v. District Court*, 33 Minn. 235; *Hardenburgh v. Kidd*, 10 Cal. 402.

Upon application for confirmation of the assessment the jurisdiction of the Court is limited to reviewing the assessment proper, that is the apportionment of the amount of the benefit among the lots benefitted. It cannot go beyond this and review the determination of the amount and extent of the special benefit. A Court, in reviewing an assessment, cannot review political action, such, for instance, as the determination of the limits of the assessment district. *In re Livingston Street*, 18 Wend. 556.

The order of the Court was not justified by the evidence. On application for confirmation of an assessment the District Court cannot refuse to confirm and cannot order a new assessment, unless it clearly appears that the Board of Public Works has failed to exercise its judgment, or that the assessment has been made under the influence of fraud or demonstrable mistake of fact. *State ex rel. v. Judges of the Eleventh Judicial District*, 51 Minn. 539; *Rogers v. City of St. Paul*, 22 Minn. 494; *Carpenter v. City of St. Paul*, 23 Minn. 232; *State v. Board of Public Works*, 27 Minn. 442; *State v. District Court*, 29 Minn. 62; *State v. District Court*, 32 Minn. 181; *State v. District Court*, 33 Minn. 164.

If the District Court is to be allowed to usurp such powers as have been exercised by it in this case, it will result in allowing the arbitrary will of the Court and not the will of the people, to govern in almost all matters of local improvement.

*Billson & Congdon*, for the respondents.

On application of the City of Duluth to the District Court for the confirmation of an assessment for special benefits resulting from

the acquisition of property for park purposes, such Court has jurisdiction to determine that the property so assessed, or any part of it, receives no special benefit from such improvement, or that if it does receive such special benefit, it is less than the amount for which such property is assessed. We concede at the outset that no such jurisdiction exists unless it is conferred by statute, but claim that it is so conferred. Sp. Laws 1891, ch. 54, § 8; Sp. Laws 1887, ch. 2, subch. 5, §§ 7, 8, 9, 10; Sp. Laws 1889, ch. 19, § 8; *State ex rel. v. District Court*, 33 Minn. 235.

That portion of the Duluth Charter authorizing the District Court, on confirmation of an assessment for local improvements, to pass upon the question of the amount of special benefit received by a given tract, from such local improvement is constitutional. It does not contravene Const. Art. 9, § 1.

The Constitution does not preclude the Legislature from authorizing the municipality to use the machinery of the Courts in settling any disputed question of fact that may arise between the municipality and property owners in such proceeding. An examination of the Duluth Charter discloses that the desirability of this improvement was first passed upon by the Board of Park Commissioners. They thereupon recommended it to the Common Council, who, after examination, approved it. The Board of Park Commissioners thereupon proceeded to acquire title to the land, and thereupon reported such acquisition to the Board of Public Works, whose duty it then became to assess and collect the cost of the improvement, or a part of it. Every step in the procedure was, and still is, under the immediate control of the authorized representatives of the city. The Court did not and could not order the improvement, nor institute assessment proceedings, nor control them when instituted, and any statute attempting to give it this power, would be unconstitutional.

The levy and collection of a tax is an administrative function, and therefore it is not necessary for the Legislature to refer to the Court any question that might arise in the collection of the same, yet the Legislature has the power to refer to a Court any such question which is not essentially legislative or administrative in its character. Of the latter kind are the questions whether it is proper to order an improvement, and what class of property shall

bear the cost of such improvement. These questions a Court cannot decide, but whether a given tract belongs to the class of lands which the Legislature has said must bear the cost of improvement is peculiarly a judicial question and can be referred to the decision of a Court, if the Legislature so elects, and in so doing, the Legislature in no sense deprives the municipality of the control of its own affairs, or its people of local self-government.

The order of the Court was justified by the evidence. In this class of cases the well settled rule in regard to ordinary findings of fact in cases tried by the Court without a jury applies. *State v. Ensign*, 54 Minn. 372.

GILFILLAN, C. J. Sp. Laws 1889, ch. 401, created a corporation styled the "Board of Park Commissioners of the City of Duluth," vesting it with power to establish a system of public parks and parkways for that city. Sp. Laws 1891, ch. 54, amended that act so as to establish a department of the government of that city named the "Board of Park Commissioners of the City of Duluth," consisting of five commissioners, of whom the mayor of the city is to be *ex officio* one, the others to be appointed by him, with the advice and consent of the Judges of the District Court for the county of St. Louis residing in that city; vacancies to be filled in the same manner. The board is authorized to acquire by purchase, or under the right of eminent domain, for and in the name of the city, lands for parks or parkways. By section 8 of the act the city is authorized to cause special assessments to be levied for special benefits derived from the appropriation of any property in any manner for park or parkway purposes in this way: Upon acquiring property for such purpose, the board of park commissioners shall report to the board of public works of the city, the location and cost thereof, and it shall thereupon be the duty of the board of public works "to determine the specific lots, tracts and parcels of land, if any, specially benefitted, and the amount of such special benefit, beyond the general benefit to all real estate in said city, derived from such acquirement for parks and parkway purposes, and to assess such specially benefitted property therefor. Said lots, tracts and parcels of land so determined and assessed shall be deemed and held to be all the lots, tracts and parcels of

land specially benefited by such acquirement. And all such assessments shall be levied, confirmed and collected and shall be a lien upon the property assessed in like manner as is prescribed by law for other assessments for local improvements, under the supervision of said board of public works."

The provisions of the charter in reference to confirming other assessments for local improvements made by the board of public works are in Sp. Laws 1887, ch. 2, subch. 5, § 10, as amended by Sp. Laws 1889, ch. 19, § 8. It is therein required that the board of public works shall, after having completed an assessment, give notice of an application to the District Court, or a Judge thereof at chambers, for an order confirming the assessment. Parties interested are given the right to appear and make objections to the assessment, "and it shall be the duty of said District Judge to hear any objections that may be offered to the same by parties interested. \* \* \* Said Judge or Court shall have power to revise, correct, amend or confirm said assessment in whole or in part, and to make or order a new assessment in whole or in part, and the same revised or confirmed on like notice. All persons may appear before said judge or court, either in person or by attorney when such application shall be made, and may object to said assessment either in whole or in part."

September 8, 1891, the board of park commissioners having acquired lands for a park at a cost of \$50,607.42, reported the same to the board of public works. That board determined what lots, tracts, and parcels were especially benefited; that they were specially benefited over and above the general benefit to all real estate in the city to the amount of \$28,870.95; and thereupon, after notice, assessed the benefits to each of such lots, tracts, or parcels, and gave notice of an application to the District Court for an order confirming the assessment. Several owners filed objections, specifying the lots on behalf of which they objected, and objecting on the ground that the lots were not specially benefited, and that the assessment, as made, was not equal and uniform.

After a hearing, the court found certain facts, to wit: "*First*, that certain of the property in the vicinity of the land acquired for park purposes, and included in said assessment, is specially benefited by the acquisition thereof; *Second*, that such specific



benefits do not amount to the sum assessed by said board, and that said assessment is excessive; *Third*, that the special benefits arising out of the acquisition of said lands do not extend over a portion of the territory specified in said assessment roll."

And thereupon the court made this order: "That said assessment be not and the same is not confirmed; and it is further ordered and adjudged that said board of public works make a new assessment in whole of the special benefits arising out of the acquisition of said property for park purposes."

The board of public works thereupon applied to have the findings made more certain and definite, so as to show what lots are deemed by the court to be specially benefited and those not benefited, and the specific lots wherein the assessment is deemed excessive. This application was denied; and by *certiorari* on the relation of the mayor of the city the proceedings are brought to this court.

The relator claims that, under the acts from which we have quoted, the determination of the board of public works as to the specific lots, tracts, and parcels of land specially benefited, and the amount of such benefit to each, is conclusive. If this were so, it would leave for the District Court to determine only whether the board had exercised its judgment, and whether there has been, in the assessment, fraud or demonstrable mistake of fact,—questions to which this court, in decisions upon cases arising under other city charters, (notably that of St. Paul,) has confined the District Court in applications for judgment upon completed and confirmed assessments. But it is impossible to construe section 10 of this charter, as amended, so as to confine the power of the District Court within the narrow limits claimed for it. The power conferred, (not found in any charter upon which the decisions we have referred to were made,) "to revise, correct, amend, or confirm said assessment in whole or in part, and to make or order a new assessment in whole or in part," is power to review, for the purpose of correcting, or annulling and remitting to the board, the entire work of the board as expressed in the assessment, and necessarily implies power in the court to inform itself, by taking evidence, whether the assessment is just and proper. If this power were merely political, administrative, or ministerial, there might be some ground for arguing that vesting it in the court is obnoxious to constitutional ob-

jections, because giving power to levy taxes for local improvements, upon property within a municipality, to an agency entirely independent of the municipal government, and because requiring of the judiciary the exercise of functions belonging wholly to some other department of the government. Whether a local improvement shall be made, and whether the cost shall be borne by the entire city, or by the property specially benefited, is a question in its nature political, and in no sense judicial, just as is the question whether private property shall be taken for public use. But the legislature may commit to the courts, as a quasi judicial function, the power to determine what is just compensation for taking private property for public use, and, when the burden of a local improvement is imposed upon particular property, (as upon property specially benefited,) we think it may be committed to the court to determine as a quasi judicial question whether the assessing officers have correctly determined the facts upon which the assessment is made.

Both questions, however,—that of the extent of power conferred on the court, and that of the constitutionality of the act,—are fully disposed of by *State ex rel. v. District Court*, 33 Minn. 235, (22 N. W. Rep. 625,) in which the court construed, and held to be valid, an act very similar in terms to that we are considering.

The relator also claims that the court has no power to review the determination of the board as to the particular lots benefited, nor as to the aggregate amount of benefit; but that, the board having determined what lots are specially benefited, and what the aggregate of all the benefits is, the court, on application to confirm, can only review the apportionment of that aggregate to the respective lots.

The act does not contemplate that any lot shall be assessed, except it be specially benefited, and only to the extent that it is so benefited. Ascertaining what lots are benefited is as much a part of the assessment as determining how much each lot is benefited, and the aggregate is to be ascertained by adding together the benefits to the respective lots. The power to "revise, correct, amend, or confirm said assessment in whole or in part, and to make or order a new assessment in whole or in part," covers the whole matter.

The relator also makes the point that the order of the court is not justified by the evidence. This is made upon the proposition that the only facts as to which the court could inquire, and on which it could base such an order, are that the board failed to exercise its judgment in making the assessment, or that there intervened fraud or demonstrable mistake of fact, and that there is no evidence of such facts. As we have already stated, the inquiry by the court is not confined to those facts, but its work is a review, and, where necessary, a correction and revision, of the work done by the board.

The relator seems to insist that it was improper for the court to take the opinions of witnesses (experts) upon the questions of benefits to particular lots. As the "benefits" are to be found and stated in dollars and cents, the word can mean nothing more than enhancement in value. The value of real estate is always more or less a matter of opinion, and it would generally be impossible to prove the value except by opinions. In this case they were admissible.

No objection is made to the order on the ground of its being indefinite, but we deem it proper to say that in such a case an order sending the matter back for reassessment ought to specify particularly the defects in the assessment not confirmed, so as to guide the board in making the new assessment.

Order affirmed.

(Opinion published 56 N. W. Rep. 1006.)

Application for reargument denied November 23, 1898.

PINE MOUNTAIN IRON & COAL CO. *vs.* JEROME B. TABOUR.

Argued by respondent, submitted on briefs by appellant, Oct. 30, 1893. Affirmed  
Nov. 17, 1893.

No. 3215.

**The discretion of the trial court when not reviewable.**

Where there is no abuse of the discretionary power of the court below, as in this case, in refusing the application of the defendant to set aside his default in not answering, the order should be affirmed.

Appeal by defendant, Jerome B. Tabour, from an order of the District Court of Hennepin County, *Charles W. Pond, J.*, made October 20, 1892, refusing to vacate a judgment in the action and to allow him to answer.

The plaintiff, the Pine Mountain Iron and Coal Company, a foreign corporation, brought this action to recover of its agent the defendant \$2,057.17 rents collected by him from its tenants of Central Park Terrace in Minneapolis. The summons and complaint were personally served August 15, 1892. The defendant did not appear or answer and judgment was entered September 6, 1892, for the amount claimed with interest and \$7.52 costs. On October 6, 1892, defendant obtained an order to show cause and gave notice according to the special practice in the Fourth Judicial District, that he would move the Court on October 8, 1892, upon affidavits, to vacate the judgment and allow him to answer, but served no proposed answer with the motion papers. His affidavit was that he had a counterclaim for repairs, expenses and commissions amounting to more than the rents collected, and that plaintiff's attorneys had orally promised to delay the entry of judgment and examine his counterclaim and adjust it with him. They by affidavits denied this, and stated that defendant repeatedly promised to pay the judgment. The Court denied the defendant's application, saying; There is nothing to prevent his bringing an action on his counterclaim if he has any. The statute on which *Fowler v. Atkinson*, 6 Minn. 503, was based was repealed prior to the decision in *Douglas v. First Nat. Bank*, 17 Minn. 35.

*Welch, Botkin & Welch*, for appellant.

The lower Court mistook the character of the defendant's proposed defence and treated it as being in the nature of a counterclaim, but it is not, it is a defense pure and simple. The defendant would have no standing in an independent action. The facts simply constitute payment of plaintiff's demand.

*Rea, Hubachek & Healy*, for respondent.

An application to vacate a judgment and for leave to answer is matter of discretion with the Court below; and an order refusing such application will not be reversed, except for abuse of discretion. *Smith v. Harmon*, 32 Minn. 312; *Sandberg v. Berg*, 35 Minn. 212.

The application of defendant was fatally defective in that no proposed answer was included among the moving papers.

BUCK, J. An examination of the record in this case satisfies us that the court below was fully justified in the exercise of its discretionary power in refusing the application of the defendant to vacate the judgment rendered against him, and allow him to answer. In its finding, the court states that the counter affidavits introduced on the hearing by plaintiff against those of the defendant upon his application were true. These affidavits strongly contradicted those of the defendant. There is not the slightest ground to say that the court below abused its discretionary powers in this respect. That the defendant was guilty of inexcusable neglect is too apparent to need discussion. There is no finding of the court below upon the question of whether the defendant, by neglecting to appear and answer, is barred by the statute from bringing an action upon his alleged counterclaim to the cause of action set up in the plaintiff's complaint, although it is referred to in its memorandum. The real question before the court seems to have been the inexcusable neglect in the matter of not appearing and answering. Upon that question the court below, in the proper exercise of its discretionary power, found against the defendant, and, upon the record, we do not think it should be reversed here. The other question, of whether the defendant is barred from bringing an action upon the matters which he seeks to bring into the suit by vacating the judgment and answering, can be determined in another

action if such action is brought. We do not determine that question now, as it is not properly before us. The order of the court below is affirmed.

(Opinion published 56 N. W. Rep. 895.)

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TIMOTHY D. SHEEHAN *et al.* vs. JAMES B. DOWLING.

Argued Nov. 6, 1893. Affirmed Nov. 17, 1893.

No. 8339.

**Discretionary order not reviewed.**

Where there is no abuse of discretionary power on the part of the trial court in its order granting the motion for a new trial, such order will be sustained by this court.

Appeal by defendant, James B. Dowling, from an order of the District Court of Ramsey County, *Chas. D. Kerr, J.*, made March 25, 1893, granting plaintiffs' motion for a new trial.

The plaintiffs, Timothy D. Sheehan and Edward J. Cannon were partners in business practising law at St. Paul and were retained by, and rendered professional services for defendant, for which he by special contract agreed to pay them \$2,000. They brought this action to recover this sum and \$1,105.76, money paid, laid out and expended for his use and benefit and at his request. They admitted payment of \$1,591.18 on account. Defendant answered admitting plaintiffs to be attorneys at law but denying every other allegation of the complaint. For counterclaim he alleged that plaintiffs collected and received for him the \$1,591.18 and had paid to or for him \$966.30 thereof and he demanded judgment for the balance. On the trial defendant had a verdict for \$507.76. Plaintiffs moved for a new trial and it was granted, the Court saying that plaintiffs' evidence of the special contract was clear, positive and explicit, but defendant's evidence regarding it was evasive, indefinite and ambiguous, that the preponderance was so great that it was manifest the verdict should not stand. The discussion in this Court was upon the evidence, whether it was so balanced that the trial Court was justified in setting the verdict aside.

v.55M.—19

*C. D. & Thos. D. O'Brien*, for appellant.

*M. D. Munn*, for respondents.

BUCK, J. We have examined with care the quite lengthy record in this case, and we think that the court below was fully justified upon the evidence in granting a new trial. And we do not feel disposed to depart from the rule laid down in *Hicks v. Stone*, 13 Minn. 434, (Gil. 398,) that great weight will be given by this court to the opinion of the judge who presided on the trial in the court below. Manifestly there was no abuse of discretion of the trial judge, and his order granting a new trial is affirmed.

(Opinion published 56 N. W. Rep. 896.)

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ALFRED J. DEAN *vs.* FRED. E. GODDARD *et al.*

Argued Oct. 26, 1893. Affirmed Nov. 17, 1893.

No. 8257.

**Title may be made by adverse possession which ended before suit commenced.**

In an action to determine the question of title by adverse possession, the period relied upon need not be the statutory one next before the time when the action is commenced. If such title becomes complete it is not lost or forfeited by any subsequent interruption of the possession, unless by some other adverse possessor holding for such a length of time as would create title in himself.

**Title by adverse possession is title in fee simple.**

A title acquired by adverse possession is one in fee simple, and is as perfect a title as one by deed. The legal effect of such title not only bars the remedy of the owner of the paper title, but divests his estate, and vests it in the party holding adversely for the required period of time, and is conclusive evidence of such title. The title so acquired is predicated upon the presumption or proven fact that the prior owner has abandoned the premises.

**The holder of a title so acquired may bring suit to remove a cloud.**

If there is any cloud resting upon the title acquired by adverse possession, the owner of the premises has a legal right to apply to the court, and have his rights adjudicated, and have the cloud removed, and his title perfected by judgment record, if the evidence sustains his claim.

55	290
62	313
55	290
65	502
55	290
80	485
55	290
84	7
84	158

**Departure on the trial from the pleading.**

Where the plaintiff inserts in his reply repugnant allegations, and the defendant does not move to have the pleading made certain and definite, nor move to compel the plaintiff to elect upon which of such allegations he will rely, but allows the plaintiff, without objection, to introduce parol evidence which shows one of the allegations to be indisputably true, the defendant will be estopped from claiming that the written pleadings should control the parol evidence so given.

**Possession when adverse to the holder of the paper title.**

If permissive possession of land, with parol executory conditions attached, do not constitute adverse possession, as between the parties, yet it might be so as against third persons or strangers.

**Continuity of possession.**

The continuity of adverse possession is not broken by the party in possession taking written conveyances of the premises from other parties claiming an interest therein, as this may give him color of title, and perhaps define the boundaries of the premises claimed.

**Possession when deemed hostile.**

Where the trial court finds that the possession has been adverse for a period of twenty years, it is a substantial and sufficient finding that such possession has been hostile during that period of time, especially if all of the other ingredients necessary to constitute adverse possession are found by the court to exist.

**Actual residence on the premises not necessary to adverse possession.**

The intent to claim by adverse possession may be inferred from the nature of the occupancy, and the possessory acts necessary to constitute adverse possession depend upon the character of the property, its location, and the purposes for which it is ordinarily fit or adapted. Actual residence upon the premises is not necessary, nor is it incumbent upon the adverse possessor to make oral declarations of his adverse claim. The mere fact that time may intervene between successive acts of occupancy, while the party is temporarily absent, engaged in business,—as in cutting logs to be sawed into lumber to be piled and stored on the premises by such party,—will not destroy his continuity of possession.

**The statute of limitation of actions based on public policy.**

The highest considerations of public policy demand that our real property should be occupied and made productive, and the taxes promptly paid, to the end that all the governmental functions be maintained, the people protected in their just rights, and the country thereby made prosperous.



**Same—a statute of repose.**

The statutes upon the subject of adverse possession are properly called "statutes of repose," and are intended to prevent litigation, and to quiet the titles to land which has remained unoccupied by the actual owner for a long period of time. The statute, which the actual owner is presumed to know, is a continual warning to him; and if, through his negligence or selfishness, he allows others to occupy, use, and improve his land for a long period of time, he must be deemed to have acquiesced in the possession of his premises by his adversary.

Appeal by defendant, Fred E. Goddard, from an order of the District Court of Hennepin County, *Thomas Canty, J.*, made December 3, 1892, denying his motion for a new trial.

The plaintiff, Alfred J. Dean, brought this action September 2, 1891, under 1878 G. S. ch. 75, § 2, to determine the adverse claims of Goddard and all other persons or parties unknown claiming any right, title, estate, lien or interest in the real estate described in the opinion. Goddard alone answered. He claimed to have the title in fee derived from the United States. Plaintiff replied that neither Goddard his ancestor, predecessor or grantor was seized or possessed of the lot within fifteen years next before the commencement of the action. That Alfred H. Lindley owned the lot in 1866 and he and wife on August 28, 1866, conveyed it to William D. Washburn, that on or about June 1, 1866, Washburn entered into actual possession of the lot under such deed and he and his grantees have ever since and for more than fifteen years prior to the commencement of this action, been in actual, exclusive, open, hostile and adverse possession thereof, under claim and color of title and that plaintiff is the remote grantee of Washburn.

A jury was waived and the issues were tried before the Court on August 2, 1892. Plaintiff submitted evidence of the possession of the lot by himself and his grantors and read in evidence the several instruments under which such possession had been held and rested. The defendant Goddard then proved his paper title from the Federal Government down and rested. The Court found plaintiff to be sole owner in fee and in possession of the lot and that he and his grantors and predecessors in interest had been in open, continuous, exclusive and adverse possession thereof, with color of title and paying taxes thereon, for a period of twenty years and ordered judgment for plaintiff as prayed in his complaint.

The defendant moved the Court to amend its findings so as to show that Washburn's adverse possession commenced on or about August 28, 1866, the date of his deed from Lindley and wife and not prior thereto. This motion was denied. Defendant then moved for a new trial, but was denied and he appeals, claiming the evidence does not show actual, continuous hostile occupation of the lot by plaintiff and his grantors for an uninterrupted period of fifteen years at any time since Washburn obtained his deed from Lindley. The discussion here was upon this evidence, whether it sustained the finding of adverse possession.

*C. J. Cahaley and Little & Nunn, for appellant.*

*Woods & Kingman, for respondent.*

BUCK, J. The question raised in this case is whether the plaintiff has acquired title by adverse possession to the premises described in the complaint, viz. the front half of lots one (1) and two (2) in block sixty seven (67) in the city of Minneapolis.

The action was commenced in August, 1891. In his complaint the plaintiff alleges that he is in possession, and is the owner in fee simple, of the premises above described, and that the defendants claim some estate or interest in the premises adverse to the plaintiff, and prays that the claims of the respective parties be adjudged and determined, and that title to said premises be decreed to be in the plaintiff. The defendant Goddard answered, and alleged the title in fee to be in himself. The plaintiff replied, and such reply will be referred to hereafter. Plaintiff's contention is that he acquired title by possession held adversely for such a length of time as to create a title in himself.

Under 1878 G. S. ch. 66, § 4, the time limited for commencing actions for the recovery of real property was fixed at twenty years; but on April 24, 1889, the law was changed to fifteen years,—not to take effect, however, until January 1, 1891. The law, as amended, would be applicable to actions commenced after January 1, 1891, and prior to the time of the commencement of this action, in September, 1891; but this would not render the law existing prior to the amendment inapplicable to causes of action, when there was twenty years' adverse possession before the time when the change took effect. The period, however, relied upon, need not be the twenty

years immediately preceding the 1st day of January, 1891. It would be sufficient if the possession relied upon was continuous for twenty years up to any certain or definite time. Of course, the twenty years would have to be complete before the bringing of the action; but such twenty years need not, necessarily, be those next before the time when the action is commenced. In this case, if the inception of the plaintiff's adverse possession was in the months of June or August, 1866, and became perfect by continued adverse possession until the month of June or August, 1886, then the title thereby created would not be lost or forfeited by any subsequent interruption of the possession, unless by some other adverse possession for such a length of time as would create title in the possessor.

The court below found the allegations in the plaintiff's complaint to be true, and that he was, at the time of the commencement of this action, the sole owner, in fee, and in the lawful possession, of the premises described in the complaint, and that he and his grantors and predecessors in interest had been in the open, continuous, exclusive, and adverse possession of the premises, with color of title, and paying taxes thereon, for a period of twenty years, and that he was entitled to the decree and judgment of the court declaring him to be the absolute owner of the premises. We think a title acquired by adverse possession is a title in fee simple, and is as perfect as a title by deed. The legal effect not only bars the remedy of the owner of the paper title, but divests his estate, and vests it in the party holding adversely for the required period of time, and is conclusive evidence of such title. To say that the statutes upon this subject only bar the remedy, as some authorities do, is only to leave the fee in the owner of the paper title; thus leaving the owner with a title, but without a remedy. We think the better and more logical rule is to hold that the occupier of the premises by adverse possession acquires title by that possession, predicated upon the presumption or proven fact that the prior owner has abandoned the premises. Adverse possession ripens into a perfect title. This title the adverse possessor can transfer by conveyance, and when he does so he is conveying his own title, and not a piece of land where the title is in some other person, who is simply barred of any remedy from recovering it. See *Campbell v. Holt*, 115 U. S. 620, (6 Sup. Ct. Rep. 209;) *Baker v. Oakwood*, 123 N. Y.

16, (25 N. E. Rep. 312,) and cases there cited. Now, if there is any cloud resting upon such title, he has a legal right to apply to the court, and have his rights adjudicated, and the title perfected by judgment record, if the evidence sustains his claim. Considerations of public policy demand that this should be so, for the claim of title to lands can thus be found of record, instead of resting in parol, with all of its incidental dangers and trouble in establishing title.

Now let us consider the question raised by the defendant, as to whether one of the plaintiff's predecessors, Washburn, entered into the adverse possession of the premises June 1, 1866, or August 28, 1866. The plaintiff claims such entry was on the 1st day of June, and the defendant insists that the true date, if there was any such adverse entry at all, is shown by plaintiff himself, in his reply, to be August 28, 1866. The importance of these dates arises from the fact that there is evidence tending to show an adverse possession of the premises by the predecessors of plaintiff until the middle of July, 1886; and if the period of twenty years commenced June 1, 1866, of course, the expiration of that period would be June 1, 1886, and if the period commenced August 28, 1866, the twenty-year period would expire August 28, 1886. Thus, the true date becomes material. The plaintiff, in his amended reply, inserted the following allegation, viz.: "That on or about the 1st day of June, 1866, and more than fifteen years prior to the commencement of this action, said William D. Washburn, under the deed hereinbefore recited, executed to him by said Lindley, and claiming thereby to be the owner of said premises, entered into possession and actual occupation of the same." The deed referred to bears date August 28, 1866. It may be that there is sufficient undisputed evidence to show an adverse possession during this particular time, but we think that, under the circumstances, the parties are entitled to the opinion of this court upon this phase of the case. The fault of the defendant's position is this: That he allowed the plaintiff to introduce and prove beyond dispute, by parol evidence, without objection, that Washburn entered upon these premises June 1, 1866.

The rule, therefore, that the written allegations of the pleadings should control, does not apply. The defendant did not move to have the pleadings made certain and definite, nor to compel the

plaintiff to elect upon which of the dates he would rely as the time of Washburn's entry upon the premises, but remained silent, and allowed the date of June 1, 1866, to be undisputably proven by the plaintiff. The allegations in the reply were repugnant as to the dates of Washburn's entry, but the defendant, by his conduct, waived his right to insist now that the date of such entry should be determined as of August 28, 1866. He is estopped by the admitted parol evidence from insisting that the written pleadings should be construed in his favor, and against the plaintiff.

There is no dispute, however, that Washburn did procure a deed of the premises from Lindley dated August 28, 1866; and the defendant therefore contends that Washburn's entry, if adverse at all, should only be considered as having commenced on the date of the deed. To support this contention, he invokes the doctrine that one who enters upon land under a mere agreement to purchase does not hold adversely, as against his vendor, until his agreement has been fully performed, so that he has become entitled to a conveyance. This doctrine is not applicable to this case. Washburn's entry and holding was not under this defendant, nor any of his predecessors holding paper title. As we have already stated, it appears that he was in possession on the 1st day of June, 1866; and whether by permission of Lindley, or by his own voluntary entry, is immaterial, as to his rights against parties other than Lindley, and Lindley is not complaining, or questioning his rights, or time of entry. Nor is defendant claiming title under Lindley. If permissive possession, with parol executory conditions attached, would not constitute adverse possession as between the parties, yet it might constitute adverse possession as against third persons or strangers. Washburn's entry was adverse as against those under whom defendant claims by paper title. If, therefore, Washburn's entry, of June 1, 1866, was his own adverse act, and he so continued in possession of the premises until long after August 28, 1866, there is no need of considering the doctrine of tacking, or the necessity of the continuity of possession. Obtaining a deed to the premises from Lindley would not destroy Washburn's previous adverse possession, nor break its continuity. He had a right to strengthen his adverse claim to the premises, if possible, by as many written conveyances from other parties claiming any interest therein as he saw fit, and

thus give him color of title, and perhaps define the boundaries of the premises claimed by him.

The essential ingredients necessary to create title by adverse possession are now so well defined and understood that we shall not enter into any argument or discussion to show what they are. We merely state them in this connection that we may the more conveniently apply them to the undisputed facts in this case. "To be adverse, possession must be actual, open, continuous, hostile, exclusive, and accompanied by an intention to claim adversely." *Sherin v. Brackett*, 36 Minn. 152, (30 N. W. Rep. 551.)

This leads us to the question raised by defendant,—that the court below did not find, specifically, that plaintiff's possession, or the possession of his predecessors, was hostile. But it did find that such possession was open, continuous, exclusive, and adverse during the requisite period. The greater includes the less. If it was adverse, it was hostile. In *Sedg. & W. Tr. Title Land*, § 749, it is said that "it is tautology to say that adverse possession must be 'hostile.'" Such hostility may be manifested by acts of possession and use of the premises, plainly visible, actual, open, and continuous, such as appeared in this case, by using the premises for many years as a lumber yard, building a barn and shed thereon in 1866 or 1867, and keeping the same on the premises until they burned down, in March, 1884, and keeping a large number of horses on the premises and in the stables for many years. Also, storing machinery, lamp posts, castings, and other personal property, putting a large sign on the lot, with notice thereon that it was for rent, for a long term of years, were acts of hostility, as tending to show very strongly that some one was assuming dominion over the premises, and had intended to, or was usurping the possession.

If, as was said by the court in *Stephens v. Leach*, 19 Pa. St. 263, the adverse possessor "must keep his flag flying," yet it is no less essential that the actual owner should reasonably keep his own banner unfurled. The law, which he is presumed to know, is a continual warning to him that if he shall allow his lands to remain unoccupied, unused, unimproved, and uncultivated, he may by adverse possession for a long period of time, fixed by law, be disseised thereof, and be deemed to have acquiesced in the possession of his adversary. In this case, the actual owners by paper title have never

occupied the premises since the first owner obtained his title from the government, in 1855 or 1856. Considerations of public policy demand that our lands should not remain for long periods of time unused, unimproved, and unproductive. Taxes should be promptly paid. It nowhere appears that the owners by paper title have ever paid any taxes, but they have allowed the adverse occupants, during a period of many years, to pay nearly \$5,000 taxes upon the premises. Payment of taxes shows claim of title. *Paine v. Hutchins*, 49 Vt. 314. We can readily understand how these statutes are called "statutes of repose." The burdens of government must be met; its educational interests provided for; its judicial, legislative, and executive functions maintained; and to do this our real property must be made productive, to the end, among other things, that taxes may be raised and paid from land not subject to continual litigation, but the titles thereto quieted. If the selfish, the indolent, and the negligent will not do this, there is no more merit in their claim than that of the adverse possessor, who does so, whatever may be said of the harshness of the statute of limitation. The settlement and improvement of the country, with its consequent prosperity, should be superior and paramount to the speculative rights of the land grabber, or selfish greed of those who seek large gains through the toil, labor, and improvements of others. The hostile possession of the adverse claimants in this case fully appears. The possession has been open, visible, hostile, and notorious, as appears from the evidence. It has been exclusive, for no one else has made any claim to it. Those who have been on the premises, other than plaintiff or his predecessors, have made no claim of right, but have paid rent to the adverse claimant, or were there simply as trespassers, which would not break the continuity of possession. The intent to claim may be inferred from the nature of the occupancy. Oral declarations are not necessary. Possessory acts, to constitute adverse possession, must necessarily depend upon the character of the property, its location, and the purposes for which it is ordinarily fitted or adapted. If a person should take possession of farm land, build a barn and shed thereon, and allow them to remain there for years, plow and cultivate the land and harvest the crops, pay taxes on the premises, and actually occupy them, for such a period of time, as is usually done by the actual owner of such farm land, with such open, no-

torious, visible, hostile, and exclusive acts as would destroy the actual or constructive possession of the true owner, if continued long enough, it would ripen into a complete title, although there might not be actual residence upon the premises by the adverse claimant or possessor. The acts necessary for such purpose might be different with a city lot. The question is to what purpose may it be ordinarily fit and adapted, and reasonably used. In a large manufacturing city, with vast lumber interest, the use of a lot for piling lumber thereon, and there storing it or keeping it for sale, might be the best use to which such lot could possibly be adapted. And, as part of such business, the building of a barn and shed thereon, for keeping and stabling horses used in procuring logs, as a part of such lumber business, would constitute a very strong ingredient of adverse possession.

The mere fact that time may intervene between successive acts of occupancy, while a party is engaged in such lumber business, as by taking his teams from such stable and shed, and using them in procuring logs to be sawed into lumber to be by him piled and stored upon such premises, does not necessarily destroy the continuity of possession. During such time, the lumber left upon the lot, the barn and shed there remaining, and various implements connected with such lumber business used upon the premises, would indicate that some one was exercising acts of dominion over the lot, even though the party was occasionally and temporarily absent upon the business for which he was using such lot.

We think the whole record herein presents such a state of facts that the court below was justified in its finding and decision. If there was error in admitting testimony showing that sand was removed from the premises after the commencement of this action, it certainly could not have prejudiced the defendant.

We find no prejudicial error, and the order of the court below, denying a motion for a new trial, is affirmed.

(Opinion published 56 N. W. Rep. 1060.)



*In re* CHARLES A. SWENSON'S ESTATE.

Argued Nov. 13, 1893. Reversed Nov. 27, 1893.

No. 8333.

**A will may speak as of the day of its execution.**

The rule that a will speaks as of the day it takes effect as to the persons who are to take under it, is not an unyielding one, nor is there an inflexible rule for determining the meaning of the words "heirs at law" when found in such an instrument.

**"The facts stated; "Heirs at law" construed to mean "next of kin."**

A will was made in the year 1884, by a married man. He had no children, and his wife and himself were so advanced in age that it could not be expected that children would thereafter be born, and none were born, to them. By the terms of this will he devised to his wife a life estate in all of his real property, and also gave to her a share of his personal estate. Subject to said life estate, he devised certain tracts of land to other persons, naming them. Then followed the following paragraphs: "Sixth. I give and bequeath all the rest of my personal property of every kind whatsoever, including notes, bonds, mortgages, and contracts, to my heirs at law, share and share alike. Seventh. I will, at the death of my said wife, Dortha Swenson, that all my said real estate not heretofore previously disposed of shall thereupon pass to and be vested in fee in my heirs at law, share and share alike." He died in 1891, about two years after the Probate Code of 1889 took effect; his wife surviving. *Held*, that the words "heirs at law," as used in the sixth and seventh paragraphs of the will, meant "next of kin."

Appeal by Christena Catharine Swenson and Hilda Louisa Peterson, from an order of the District Court of Goodhue County, *W. C. Williston, J.*, made June 21, 1893, denying their motion for a new trial.

On May 8, 1884, Charles A. Swenson of Roscoe in Goodhue County made his last will. He was over sixty years old, married but childless. His wife, Dortha Swenson, was sixty years old. His father and mother were both dead. He had two sisters, Christena Catharine Swenson and Hilda Louisa Peterson and one brother, Peter John Swenson. Two girls, Mary Swenson and Mary Jennie Johnson, not related to him, had lived in his family for several years, but

neither had been adopted by him. He possessed real and personal property in this state valued at about \$50,000. The following is a copy of his will;

### Will.

I, Charles A. Swenson of the town of Roscoe, in the county of Goodhue, and State of Minnesota, being of sound mind and memory, do make, ordain, publish and declare this to be my last will and testament:

*First*, I order and direct that my executors, hereinafter named, pay all my just debts and funeral expenses as soon after my decease as conveniently may be.

*Second*, After the payment of such funeral expenses and debts, I give, devise and bequeath unto my beloved wife, Dortha Swenson, an estate for her own life in and to all the real property of which I may die seized; to hold the same during her natural life, and to apply all the profits and increase arising therefrom to her own support and the support and education of my adopted daughter Mary Swenson (formerly Marit Johnson), until she shall arrive at full legal age. And my will is that in case any surplus of such rents and increase over and above the amount necessary for fully carrying out the purpose aforesaid shall remain in the hands of my said wife it shall be disposed of by her as she may choose.

*Third*, I give and devise to my adopted daughter Mary Swenson (formerly Marit Johnson), the homestead farm of two hundred acres occupied by me in the township of Roscoe in said county, and described as follows, to-wit: The south-west quarter and the south-west quarter of the north-west quarter of section five in township one hundred and nine (109) range sixteen (16) to hold the same subject to the said life estate of my said wife therein.

*Fourth*, I give and devise to Mary Jennie Johnson of Otter Tail county, Minn., the north half of the north east quarter of section seven (7) town one hundred and nine (109) range sixteen (16), in said Goodhue county, subject to the said life estate of my said wife therein.

*Fifth*, I give and bequeath to my beloved wife Dortha Swenson, two thousand dollars in personal property, the same to be selected by her out of any property that I may die possessed of at the valua-

tion the appraisers of my said estate may fix on the same, and should she neglect or refuse to make such selection, then it is my will that my executors shall pay her the said amount of two thousand dollars (\$2000) in cash, as soon as the same can be realized out of the proceeds of the personal property.

*Sixth*, I give and bequeath all the rest of my personal property, of every kind whatsoever, including notes, bonds, mortgages and contracts to my heirs at law, share and share alike.

*Seventh*, I will at the death of my said wife, Dortha Swenson, that all of my said real estate not heretofore disposed of, shall thereupon pass to and be vested in fee in my heirs at law, share and share alike.

*Lastly*, I make, constitute and appoint C. Albert Swenson, and Otto Thoreson executors of this my last will and testament, revoking all former wills by me made.

In testimony whereof, I have hereunto subscribed my name and affixed my seal, the 8th day of May in the year of our Lord, one thousand eight hundred and eighty-four.

C. A. SWENSON. [Seal.]

The testator died November 8, 1891, in said County. His brother died intestate September 21, 1891, leaving several children. 1878 G. S. ch. 47, § 25; Laws 1889, ch. 46, § 42. The will was proved and his estate administered in the Probate Court of Goodhue County. On February 1, 1893, that Court made a decree of distribution and assigned the entire estate to the widow, except the reversion in two farms given by the will to the girls. The sisters appealed to the District Court where the decree was affirmed. They moved for a new trial and being denied appeal.

*Charles C. Willson and Charles W. Bunn*, for appellants.

The objects of the testator's bounty, the donees of his property, are to be determined by the sense in which the words in the will were used when it was drawn and authenticated in 1884. When he made his will and selected those words to designate the persons to whom he intended to give his estate, his sisters and his brother were at common law and by the statute his heirs presumptive. 1878 G. S. ch. 46, § 3. Before his death the Legislature enacted the

Probate Code, § 64. By it, the surviving wife, as widow, but not strictly speaking as her husband's heir, is given the estate of a childless husband, if it be not otherwise disposed of by his will. When Charles A. Swenson made his will he did not intend to designate his wife by the terms, "my heirs at law, share and share alike," as she was not, by the law then in force, entitled to the estate had he died intestate. He has not since altered the will to express any new purpose and the old publication and authentication of the will still stand to verify it. It cannot be said that he has made a new will to carry out a new purpose formed after this will was made. It is claimed that he has formed such new purpose to give the residuary estate to his wife, instead of to his brother and sisters, and that the old will without any new publication has become a new and different one, having an effect different from that it had when it was executed. If by legislation or subsequent usage words in a will come to have a new or different meaning or signification from that which they had when they were chosen and used in the will when drawn and executed, the will should be construed after the testator's death in the sense which the words bore when the will was made and the words were selected to express his purpose.

Jarman says, Vol. 1, ch. 10, with regard to wills that whenever the testator refers to an actually existing state of things, his language is referential to the date of the will and not to his death, and illustrates as follows; (1 Jarm. Wills, 5th Am. Ed. 323.) If a testator give an estate or a sum of money to his son John, the gift will take effect in favor of his son of this name, if any, at the date of the will, and of him only. If, therefore, such son should die in the testator's lifetime, and he should afterwards have another son of the same name who should survive him, such after-born son would not be an object of the gift.

S. Richards made his will September 12, 1821, by which he said; "I give my wife all my mortgages, bonds, etc." She afterwards died and he married another woman, and after that died in August, 1824. The second wife claimed that the will spoke as of the testator's death, and claimed the mortgages, bonds, etc. Sir John Leach, Master of the Rolls, held the widow was not entitled. *Garratt v. Niblock*, 1 Russ. & Mylne, 629.

A testator, by a codicil, bequeathed to certain of his servants, naming them, £500 each, and then added "to the other servants £500 each." Sir Lancelot Shadwell, Vice Chancellor, held that Ann Relfe, who was a servant when the codicil was executed, was entitled to £500, although she subsequently quit the service in testator's lifetime and did not return to it and was not a servant when he died. *Parker v. Marchant*, 1 You. & Coll. 290.

Cases having no application are sometimes cited as supporting the doctrine that a will speaks as of the date of the death of the testator, rather than as of the date of the drafting of the will, when in fact the cases are upon the question whether the donees are those at the testator's death or at a subsequent time, as at the end of the life estate of the first donee. Such are the following; *Abbott v. Bradstreet*, 3 Allen, 587; *Kellett v. Shepard*, 139 Ill. 433; *Lincoln v. Perry*, 149 Mass. 368; *Wood's Appeal*, 18 Pa. St. 478.

A change in the law does not change the meaning of the words used by a testator. It may change the legal effect of a devise, and so change the legal operation of a will, but not because it changes the testator's meaning. *Hasluck v. Pedley*, 19 Eq. Cas. 271.

It has been repeatedly held in England that when the inquiry is to determine what the testator intended by the use of certain words or expressions, the old and ordinary rule applies that the will speaks as of its date. And further that this meaning prevails even where by subsequent changes of statute the words would have had a different meaning if used in a will executed after the new law. *In re March, Mander v. Harris*, 27 Ch. Div. 166; *Jones v. Ogle*, 8 Ch. App. 192; 1 Jarm. Wills, 6th Am. Ed. 332, note.

The testator's intention governs as much with respect to construing the word "heir" as to any other word in a will. And that word has, in a multitude of cases, been given such meaning as conformed to the testator's intentions gathered from the context and the whole will. It has been construed to mean children, next of kin, heirs of a particular class or description, heirs presumptive, heirs apparent, heirs at the date of the will, heirs at the testator's death, or heirs at a later date, according to the sense in which the testator intended to use that word. 2 Jarman, \*905 to \*934. The following cases are precisely in point in this case. *Watkins v. Ordway*, 59 N.

H. 378; *Richardson v. Martin*, 55 N. H. 45; *Lord v. Bourne*, 63 Me. 368; *Rusing v. Rusing*, 25 Ind. 64; *Bailey v. Bailey*, 25 Mich. 185; *Quick v. Quick*, 21 N. J. Eq. 13.

*S. J. Nelson*, for respondent.

It is a settled rule of law that a will does not take effect until the death of the testator, and those only are the heirs at law of the testator who are so declared by the law then in force. He is an heir at law upon whom the law casts his ancestor's estate immediately on the death of the ancestor. Where the language employed in the will is clear, and of well defined force and meaning, extrinsic evidence of what was intended, cannot be adduced to qualify, explain, enlarge or contradict this language, but the will must stand as it was written. In order to reach the construction which they place upon the words "*my heirs at law*" the appellants are compelled to travel outside of the instrument, and indulge in suppositions which they claim the testator had in mind when he wrote the will. *Lavery v. Egan*, 143 Mass. 389.

Wherever, by law, the wife may succeed to the estate of her husband in the same manner as an heir, to that extent she is an heir of her husband. As the wife does not come into the full possession or enjoyment of her one third interest in her husband's estate until the husband's death, in that respect she takes this one third interest as an heir of her husband. *Dayton v. Corser*, 51 Minn. 406; *Holmes v. Holmes*, 54 Minn. 352; *Glass v. Davis*, 118 Ind. 593; *Rawson v. Rawson*, 52 Ill. 62; *Alexander v. Northwestern M. A. Ass'n*, 126 Ill. 558; *Glass v. Davis*, 118 Ind. 593; *Eastham v. Barrett*, 152 Mass. 56.

The testator gives his wife a life estate in his real estate and \$2,000 of his personal property and disposes of the remainder to his heirs at law. In disposing of the remainder to "*my heirs at law, share and share alike*," the testator meant to give it to such person or persons as would answer that designation at his death. As the testator's wife, according to the law of this State, comes within the terms, "*my heirs at law*," she is entitled to take such remainder, for there is nothing in the context of the will to indicate any other than the legal definition of the words, "*my heirs at law*," and as she is the sole heir at law she is entitled to the whole estate. *Bul-*  
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*lock v. Downs*, 9 H. L. Cas. 1; *Alexander v. Northwestern M. A. Ass'n*, 126 Ill. 558; *Kellett v. Shepard*, 139 Ill. 433; *Richards v. Miller*, 62 Ill. 417; *Rawson v. Rawson*, 52 Ill. 62; *Abbott v. Bradstreet*, 3 Allen, 587.

As long as a person is living no one can be identified under the expression, "my heirs at law," and so the law gives those words a certain definition, and one who makes use of such words without giving them a clearly different definition is held to the legal definition, and parol evidence is not to be introduced to vary this definition. The testator knew that the Legislature might change the law of descent by changing the order in which persons may inherit, or in any other respect. He is presumed to have known before his death, as a matter of law, that the Legislature of this State did in 1889 change the law of descent, and that the law went into effect October 1st of that year. He knew that by that new law his wife was preferred as his heir at law over his brother, sisters or any other of his kin. If he had his brother and sisters in mind, calling them "my heirs at law" when he wrote his will, and know of the change of the law of descent for more than two years before his decease, and did not change his will, it may well be taken as proof that he had undergone a change of intention and was satisfied that his wife should take his property. He did not in his will provide against the change of the law of descent, and therefore, he took his chances in this respect. *Lincoln v. Perry*, 149 Mass. 368.

As to the question, who comes within the terms, "*my heirs at law, share and share alike*," the will speaks from the death of the testator. The expression "*share and share alike*" does not change the legal definition of the word heir.

**COLLINS, J.** The last will and testament of Charles A. Swenson, a resident of this state, was made May 8, 1884. He was a married man, childless, and the ages of his wife and himself were such that it could not be expected that children would be born to them. His father and mother were both dead. He had two sisters, these appellants, and a brother, the latter dying in September, 1891. Swenson died November 8, 1891, leaving real and personal property valued at about \$50,000. By the terms of the will Swenson gave and devised to his wife, this respondent, an estate for life in and to all

of the real property of which he died seised, she to apply the profits and increase therefrom to her own support, and to the support and education of Mary Swenson, who was described as an adopted daughter, (but who had not been adopted,) until the latter became of age. Should a surplus remain of such profits and increase over and above the amount necessary for the purpose above specified, the testator directed that it should be disposed of by his wife as she saw fit. To said Mary Swenson he gave and devised his homestead of two hundred acres, subject to the life estate of his said wife; and to one Mary J. Johnson he gave and devised another tract of land, subject to said life estate.

He gave and devised to his said wife \$2,000 in personal property, to be selected by her out of his personalty, at the appraised valuation; and, should she neglect to make such selection, his executors were directed to pay her \$2,000 in cash. Then followed the following paragraphs:

"Sixth. I give and bequeath all the rest of my personal property of every kind whatsoever, including notes, bonds, mortgages, and contracts, to my heirs at law, share and share alike.

"Seventh. I will, at the death of my said wife, Dortha Swenson, that all my said real estate not heretofore previously disposed of shall thereupon pass to and be vested in fee in my heirs at law, share and share alike."

At the time this will was drawn, and for some years afterwards, until October 1, 1889, when the new Probate Code took effect, the brother and sisters of the testator, three in number, were the presumptive heirs at law under the statutes of this state. Had he died intestate during this period, his real estate, less the share which by law must go to the widow, would have descended to these persons, next of kin, in equal shares; or, had one deceased prior to this, his or her share would have descended to lawful issue by right of representation. 1878 G. S. ch. 46, § 3, subd. 5. And had any personal property remained after setting apart certain statutory allowances to the widow and paying claims against the estate, it would have been distributed in the same way. *Id.* ch. 51, § 1, subd. 6. But by the new Code (Laws 1889, ch. 46) very radical changes were introduced into the laws of this state regulating the descent of real property and the distribution of the personalty of a



husband, or wife dying intestate and without children, and these changes, it is claimed, and it was so held in both Probate and District Courts, must govern and control the construction which is to be placed on the language used by the testator long before the enactment of the Code. To put it in another form, it is contended that we are obliged to construe the residuary clauses in the light of the new statute, and thereby confer the fee to all of the real property and the absolute title to all of the personal property upon the widow, although she was already provided for in the will; thus totally ignoring those who were heirs at law presumptive when the will was made, and who, confessedly, would have succeeded to the property had the statute remained unchanged. By the terms of subdivision 2 of section 64 of the Code the whole of Mr. Swenson's real property would have descended to his surviving wife had he died intestate subsequent to October 1, 1889, and by the provisions of subdivision 6 of section 70 she would have also succeeded to all of his personal estate. She would have been his heir at law; and, because of this, we are asked to construe the will precisely as if the change had been made in the statute prior to its execution. And to support this position respondents' counsel cites us cases in which it has been held that under a statute similar to our own the survivor may become the sole heir at law, or may be included among other heirs at law, of a deceased husband or wife; and, further, that although made the object of a special devise or bequest in the will, a surviving husband or wife may take as an heir under a residuary clause. But these cases are not exactly in point, for in all probability no controversy would have arisen between those parties had the present Code provisions been in force when Mr. Swenson made his will, in 1884. The doubt over the proper construction of the residuary clauses, and as to who should take under them, arises solely because of the statutory changes; and the cases cited did not arise under such circumstances.

The cardinal rule in the construction of wills, to which all others must bend, is that the intention of the testator expressed in the instrument shall prevail, provided that it be consistent with the rules of law. A court is bound to give that construction which will effectuate the intention, if such intention can be gathered from the terms of the will itself; and the intention is to be gathered from

everything contained within the four corners of the instrument. These are but elementary propositions, familiar to all, and in endeavoring to ascertain the intention a court is authorized to put itself in a position occupied by a testator, in order, in view of the circumstances existing when the will was executed, to discover from that standpoint what he intended by it.

Now, if we are to be governed by the dominant rule of interpretation when construing the residuary clauses in this will, bringing to our aid the environments which existed when the testator executed it in 1884, there would seem to be absolutely nothing in the way of a speedy and satisfactory conclusion. Doubt and difficulty are encountered when we abandon the effort to ascertain and carry out the intention by permitting an act of the legislature to intervene, and totally thwart the testator's plan and purpose, and to deprive his sisters and the sons and daughters of his deceased brother of the bounty which he had provided for them; for it is evident that when using the words, "heirs at law, share and share alike," as he twice did in the will, his mind was fixed upon his brother and sisters then living, and their children, if any. It was undoubtedly his intention to provide for them, first recognizing the claim that his wife had upon him and his estate. He was childless, and these relatives were his heirs presumptive under the law. His wife, should she survive him, he dying intestate, would be entitled to a life estate in their statutory homestead, and to an undivided third in fee of all other real estate. She would also be entitled to certain allowances and her support during a settlement of the estate out of the personalty, and to one-third of the residue. Of a life estate in the homestead, of a third in fee of other real property, and of these allowances and her support pending settlement she could not be deprived by will without her consent. But the one-third share of his personal estate which would have gone to her under the statute, had he died intestate, was his to dispose of by last will and testament, if he chose so to do. While the value of her share of the estate under the provisions of the will has not been made to appear, it is fairly to be inferred that the testamentary provision made for her is of greater value than was absolutely required under the statute. There is no intimation that she was not abundantly provided for.

Returning now to a consideration of the testator's intention as indicated by the surroundings and as expressed in the will, it is obvious that at its execution there were no other persons in existence to whom the words in the residuary clauses would apply. It is equally as plain that the testator contemplated no change in the statute which would involve the absurdity of an ultimate devise of real property in fee to the same person to whom he had given a prior devise for life, or that his wife, to whom he had granted a life estate in all of his lands, should in any way acquire the reversion as an heir at law. If such is to be the result, it is by means of an entire disregard of the testator's intention, and the application of unyielding rules of law. To bring this result about, we must hold that the will speaks and points out the heirs as of the day it took effect, and not as of an earlier day; in other words, that the Code was intended to alter, and in this case has altered, the proper meaning and construction of the words contained in a will drawn years before. The testator intended the reversion to go to three certain persons, designated as clearly as if their names had been written. The statute intervenes, and not a vestige of that intent can be effectuated. The rule that a will speaks as of the date of the decease is not an unyielding one, especially when by a change of statute, the words would have had a different meaning if used in a will executed under the new law. *Quick v. Quick*, 21 N. J. Eq. 13; *In re March*, *Mander v. Harris*, 27 Ch. Div. 166; *Jones v. Ogle*, 8 Ch. App. 192. Nor is there an inflexible rule for determining the meaning of the words "heirs at law," or any other words found in a will. From an examination of the authorities it will be found that these particular words have been construed to mean children, adopted children, next of kin, heirs of a particular class or description, heirs presumptive, heirs apparent, heirs at the date of the will, heirs at the decease of the testator, or heirs at a later date even, the construction seeming to rest and to be predicated upon an ascertainment of the testator's intention from the words used, from the context of the instrument and from the surrounding circumstances. 2 Jarm. Wills, (6th Amer. Ed.) \*905 et seq., and notes; Schouler, Wills, §§ 470, 533, 542, and cases cited; *Lord v. Bourne*, 63 Me. 368; *Rusing v. Rusing*, 25 Ind. 64; *Reinders v. Koppelman*, 94 Mo. 338, (7 S. W. 288;); *Howell v. Ackerman*, 89 Ky. 22, (11 S. W. 819;); *An-*

*thony v. Anthony*, 55 Conn. 256, (11 Atl. 45;) *Bailey v. Bailey*, 25 Mich. 185; *In re Sessions' Estate*, 70 Mich. 297, (38 N. W. 249.) See, also, *Greenwood v. Murray*, 28 Minn. 120, (9 N. W. 629.)

It is suggested by counsel for respondent that, although the testator may have intended that his brother and sisters should have the reversionary interest in his realty, and should succeed to his personalty upon his decease, less the amount bequeathed to his wife and her statutory allowances, he "took his chances," as it is expressed in some of the cases, when neglecting to provide for future legislation affecting the rules of descent and distribution. We are unable to see how an intent to grant the reversion to certain persons, plainly and clearly expressed, would have to be placed beyond legislative control by any provision in the will. The testator would have no reason to suppose that his manifest intent could or would be affected by legislative enactment, and that if, when he executed the will, certain persons were clearly intended and sufficiently designated as the recipients of his bounty, future legislation could interfere with or control that intention and designation. The words "heirs at law," found in the residuary clauses of the will, must be construed as of the date of its execution, and not with reference to the statute as it existed when the testator died.

The order appealed from is reversed, and the case remanded for proceedings in the court below in accordance with the views herein expressed.

(Opinion published 56 N. W. Rep. 1115.)

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DAVID A. COREY vs. ROSS CLARKE.

Submitted on brief by appellant, argued by respondent, Nov. 9, 1893. Affirmed Nov. 27, 1893.

No. 8337.

**A title held unmarketable.**

Upon the facts as found on the trial of an action brought by a vendor of real property to compel specific performance of a contract to sell and convey in respect to the condition and marketability of his title, it is *add* that said vendor could not recover.

**Finding supported by the evidence.**

A finding of fact in reference to the making of a subsequent agreement by the parties to the contract *held* warranted by the evidence.

Appeal by plaintiff, David A. Corey, from an order of the District Court of Ramsey County, *James J. Egan, J.*, made May 25, 1893, denying his motion for a new trial.

On June 15, 1892, the plaintiff made a contract with defendant, Ross Clarke, to sell and convey to him lots six, seven, fourteen and fifteen of Chute Brothers' Division No. 6 in St. Paul for \$5,000 payable one half cash on delivery of the deed and the balance in one and two years with interest secured by mortgage on the property. The purchaser paid \$200 earnest money and had ten days in which to examine title. The contract provided that if the title should be found not good the sale should be void and the earnest money returned. On examination the purchaser found mechanics' liens filed against lots fourteen and fifteen and he refused to accept the title and demanded a return of his \$200. The vendor insisted that the liens were invalid, refused to return the earnest money, tendered a deed, offered to give a bond of indemnity against the liens and brought this action to enforce performance of the contract. The defendant for counterclaim demanded the \$200 and interest. It appeared on the trial that J. W. Fairbanks, claiming to be agent for plaintiff, had prior to January 1, 1891, made a contract in plaintiff's name for the sale of lots fourteen and fifteen to Nels Burkey. The contract was recorded and Burkey commenced the construction of a house thereon. He afterwards assigned his right to Robert Brown. Several mechanics who had done work on the house, filed liens upon the two lots, and one of them commenced an action to foreclose, making Corey, Burkey, Brown and others defendants. Corey denied that Fairbanks was his agent or authorized to sell the lots. That action was pending on June 15, 1892, undetermined, but was subsequently tried and one of the lien claims was held valid for \$570 and interest against the property. The present action was tried March 25, 1893, and the Court made findings that plaintiff's title was unmarketable and directed judgment that he take nothing and that defendant recover against him the \$200 earnest money with interest and costs. Plaintiff moved for a new trial and being denied appeals.

*William G. White*, for appellant, cited *Townshend v. Goodfellow*, 40 Minn. 312; *Fairchild v. Marshall*, 42 Minn. 14; *Hedderly v. Johnson*, 42 Minn. 443; *Richmond v. Koenig*, 43 Minn. 480; *Hellreigel v. Manning*, 97 N. Y. 56; *Murray v. Harway*, 56 N. Y. 337; *Shriver v. Shriver*, 86 N. Y. 575.

*B. H. Schriber*, for respondent, cited *Goetz v. Walters*, 34 Minn. 241; *George v. Conhaim*, 38 Minn. 338; *Mackey v. Ames*, 31 Minn. 103.

**COLLINS, J.** Action by the vendor to enforce specific performance of a contract to sell and convey real estate. Defendant vendee admitted the making of the contract, whereby he was entitled to receive a good title to the property, alleged that the vendor could not convey good title, and demanded judgment for the amount paid by him as earnest money, and which was to be returned in case the vendor could not give good title. Upon findings of fact the court below ordered judgment as demanded in the answer, and this appeal is from an order denying plaintiff's motion for a new trial.

The court found that the plaintiff's title to the property was not free and clear from incumbrances. To summarize the facts as agreed upon by the parties and as found on this branch of the case, various mechanics and builders, acting under a contract to sell this property, held by one Burkey, and executed by J. W. Fairbanks, who assumed to be plaintiff's agent, had gone upon the land long prior to the making of the contract now being considered, and had erected buildings. All of this was done without any authority from the plaintiff, and without his knowledge or consent. These persons, asserting lien claims upon the property, had caused to be recorded affidavits under the lien laws of the state, and were attempting to enforce their claims by a foreclosure action wherein this plaintiff was made a defendant. After the commencement of the present action a trial as to one of these lien claims had resulted in a decision that to the amount of more than \$500 one of them was a valid and subsisting lien upon plaintiff's interest in the property. The rights of other claimants as asserted in the foreclosure action remained undetermined. With these facts in respect to pending litigation admitted by the plaintiff and incorporated into the find-

ings of the court, it is impossible to understand how he could expect to coerce the defendant into specific performance of a contract to purchase the property under which the latter was entitled to a good and marketable title. The lien claimants were not parties to the action at bar, nor were they in privity with the parties, and their rights would be wholly unaffected by any judgment which might be rendered. The validity of the claim of one of these persons had already been established as against the plaintiff himself, and the validity of each of the claims of the remaining lienors depended upon the result of litigation involving questions of fact in an action to which this defendant was not a party. That very grave doubts existed as to the marketability of plaintiff's title is obvious, and a court of equity would not for a moment think of compelling defendant to accept it. The rules which govern these cases have recently been reviewed in *Richmond v. Koenig*, 43 Minn. 480, (45 N. W. Rep. 1093,) and need not be specifically discussed on this occasion. Applied to the facts now presented, it is plain that the trial court was correct in its view of this branch of plaintiff's case.

We take it from the allegations of the complaint and the proofs, that plaintiff did not wholly rely upon his alleged perfect title to the property, but, upon a parol contract, which he avers was subsequently entered into, whereby defendant agreed to receive a bond indemnifying him from loss or damage resulting from the foreclosure action. The court below found that no such contract had been made, and this was evident from the testimony introduced by the plaintiff. This finding relieves us from considering various questions of law which would have arisen had plaintiff sustained the allegations of his complaint respecting the making of such a contract.

Order affirmed.

(Opinion published 56 N. W. Rep. 1068.)

*In re* ELEANORA HUMMEL'S ESTATE.

Argued Nov. 7, 1893. Affirmed Nov. 27, 1893.

No. 8351.

Verdict supported by the evidence.

*Held*, that the evidence produced upon the trial of this cause reasonably tended to support the verdict.

Appeal by Charles A. Passavant, Executor of the Will of Eleanora Hummel, deceased, from an order of the District Court of Ramsey County, *Wm. Louis Kelly, J.*, made May 6, 1893, denying his motion for a new trial.

On September 1, 1874, John E. Haggenmiller loaned to Joseph Hummel \$300 and took his note for the amount, due six months thereafter. Joseph Hummel died intestate December 11, 1874, owing this debt and leaving his widow Eleanora Hummel him surviving, but leaving no parent, child or kindred. He owned forty acres of land situated in Washington County worth \$1,200 which descended to his widow. 1866 G. S. ch. 46, § 1, subd. 9. She sent for Haggenmiller and he visited her. She administered the estate of her husband. Haggenmiller did not present his note for allowance as a claim against it. By the decree of distribution the forty acres of land was assigned to the widow. She thereafter paid interest on the note on several occasions down to March 1, 1888, and the payments were indorsed in her presence upon the note. She told several of her neighbors that she was owing Haggenmiller. He held no other claim against her to which these statements could have referred.

In 1892, the widow died testate. Her will was proved and Charles A. Passavant received letters testamentary. Haggenmiller presented his claim in the Probate Court for allowance against her estate. He claimed that he was sent for by her soon after the death of Joseph Hummel and that he then agreed with the widow that he would not present his note for allowance against the estate of her deceased husband and she in consideration thereof agreed with him to pay the note, that he performed on his part and she paid



interest on the note down to March 1, 1888. He asked that his claim for \$300 and interest from that date be allowed. The claim was disallowed and he appealed to the District Court. Pleadings were there framed under the direction of that Court, pursuant to Laws 1889, ch. 46, § 260. The issues thus framed were tried before a jury January 11, 1893. Haggemiller was incompetent, under 1878 G. S. ch. 73, § 8, to give evidence of or concerning any conversation with or admission of the deceased widow and he submitted his case upon the facts above stated. The jury returned a verdict in his favor and assessed his damages at \$402.25.

The executor made a case containing all the evidence and it was settled, signed and filed. On it and the record he moved for a new trial, on the ground that the evidence was insufficient to support the verdict. The motion was denied and he appeals. The discussion here was upon the evidence.

*F. F. Wilde, for appellant.*

*B. H. Schriber, for respondent.*

COLLINS, J. The real question in this case is whether the verdict was supported by the evidence. This verdict necessarily involved the finding that a certain promise to pay money to respondent, Haggemiller, was actually made by Mrs. Hummel, now deceased, shortly after the death of her husband, Joseph. It also involved an inquiry as to whether such promise, if made, as alleged by Haggemiller, was a new and original one, supported by a sufficient consideration, or collateral merely to the promise to pay made by Mr. Hummel in his lifetime, and evidenced by the note held by Haggemiller when Hummel died. It was claimed by the former that immediately after the death of Mr. Hummel the widow sent for him, and then, in consideration of his agreement not to present the note as a claim against the estate of the deceased, made a new and original promise, whereby she took the debt upon herself, and agreed to pay the amount of the same. Haggemiller, relying upon the promise, did not present or file a claim against the estate, which, in value, was more than sufficient to pay the note; and in due course of administration the widow succeeded to the ownership of the entire property as the sole heir at law. The respondent abandoned the only method open to him to collect the amount

of his claim out of the estate of Joseph Hummel, thus virtually discharging and satisfying the note. It is obvious that if a promise was made by Mrs. Hummel under such circumstances, there was ample consideration to support it.

We have examined with care the evidence upon which the verdict was rendered, and agree with counsel that it was somewhat meager and unsatisfactory. But it must be remembered that the alleged agreement was of many years' standing, and that the testimony of Mr. Haggenmiller was unavailable on the trial. Mrs. Hummel, who is said to have made the promise, had died, and Haggenmiller's testimony as to what was agreed upon between the parties was excluded under the statute. Necessarily, the testimony would lack clearness and certainty, but if, on the whole, it agreed with and supported the hypothesis which it was adduced to prove, it was sufficient. It was not disputed that when Hummel died, in 1874, Haggenmiller held his note, not yet due, for \$300, and that out of his estate this amount could easily have been collected; that his widow was the heir at law, and duly acquired all of the property as such heir; that she sent for Haggenmiller immediately, stating that there was a note or debt which she must settle; that an interview took place, and that Haggenmiller never presented his claim against the estate; that afterwards Mrs. Hummel repeatedly acknowledged herself indebted to Haggenmiller, and up to a short time prior to her decease made regular payments to him as for interest upon the sum of \$300. She paid interest upon this amount for at least 14 years. These were acts and circumstances which, as charged by the court below, the jury had the right to consider when deliberating on the case. They reasonably tend to support the contention that a new and original promise was made, as asserted by respondent, and to sustain the verdict in his favor.

Order affirmed.

(Opinion published 56 N. W. Rep. 1064.)

OMER BEAUCHAINE *vs.* JOHN R. MCKINNON *et al.*

Submitted on brief by appellant, argued by respondent, Nov. 3, 1893. Affirmed Nov. 27, 1893.

No. 8464.

**Judgment on an official bond *prima facie* evidence against sureties.**

A judgment against the principal in an official bond, recovered for acts or omissions which were a breach of the conditions of such obligation, is *prima facie* evidence against the sureties.

Appeal by defendants, John R. McKinnon, Frank Jerome, Henry R. Nolan, N. S. Gervais and E. W. Wile, from an order of the District Court of Polk County, *Gorham Powers*, J., made April 4, 1893, refusing to set aside the verdict in the action and grant a new trial.

John Paterson was on May 21, 1890, appointed by the Board of County Commissioners, Sheriff of Polk County for the residue of that year to fill a vacancy, pursuant to 1878 G. S. ch. 8, § 196. He accepted and he and his sureties gave their joint and several bond to the State of Minnesota in the penal sum of \$5,000 conditioned that if he should well and faithfully perform the duties of that office it should be void. The defendants above named were his sureties on the bond. On November 20, 1890, Paterson had in his hands for service four writs of attachment against the property of Alfonse Beauchaine and Cyrille Beauchaine. Under them he on that day attached and took four horses, a colt, four oxen, a double harness and a lumber wagon. The plaintiff, Omer Beauchaine, appeared, claimed the property, sued the Sheriff and on January 9, 1892, recovered judgment therefor against him for \$557.86. A writ of execution upon this judgment was returned unsatisfied and on application under 1878 G. S. ch. 78, § 3, leave was given and this action commenced upon the bond in the name of the plaintiff against the sureties. The complaint stated these facts in detail. The defendants answered denying that the property taken belonged to plaintiff. They alleged that it belonged to his brother, Alfonse Beauchaine and his father Cyrille Beauchaine, and that any purchase of it by him from them was fraudulent as against the attachments of their creditors. The issues were tried December 6, 1892.

Plaintiff offered in evidence the judgment roll in his action against Paterson, and the writ of execution and return thereon. Defendants objected, but were overruled and they excepted. The entire record and files in that action were then received in evidence and read to the jury. The plaintiff offered no other evidence upon the issues and rested. Much evidence was then given by the defendants in support of their claim that the sale of the property to the plaintiff was fraudulent as against the creditors of his brother and father. The jury returned a verdict for plaintiff for \$557.86 and interest. Defendants moved for a new trial, but were denied and they appeal.

*A. A. Miller and Martin O'Brien, for appellants.*

The plaintiff offered in evidence the judgment roll in the case of Omer Beauchaine against Paterson and the writ of execution and the return thereon. These constituted plaintiff's case when he rested.

The contention of the defendants is that the judgment against the sheriff is not evidence against his sureties in an action on his official bond. The objection to the introduction in evidence of the judgment roll should have been sustained. There is great diversity of opinion in the courts as to the probative force of such a judgment. Some hold that the judgment against the principal is conclusive as to the sureties, while others hold that it is only *prima facie*. In yet other states it is held that such a judgment is evidence only of its own existence. It appears to us that this last is the only reasonable rule. To deny these sureties an opportunity to be heard seems harsh and unreasonable. *Pico v. Webster*, 14 Cal. 202; *Lucas v. Governor*, 6 Ala. 826; *Governor v. Shelby*, 2 Blackf. 26; *White v. State*, 1 Blackf. 557; *Graves v. Bulkley*, 25 Kans. 249; *Pioneer Sav. & Loan Co. v. Bartsch*, 51 Minn. 474.

*Edward George, for respondent.*

When a judgment is obtained against a sheriff, based upon acts constituting official misconduct and the sheriff is insolvent, that judgment, in an action brought against the sheriff's sureties on his official bond, is either conclusive evidence, *prima facie* evidence, or no evidence at all. Plaintiff contends that it is conclusive upon

the sureties on his official bond, both as to the misconduct of the officer and the extent of the damages. Plaintiff contends that defendants are privies, by the law of their contract, to their principal, the sheriff, and are therefore conclusively bound by the judgment against him. *Masser v. Strikland*, 17 Serg. & R. 354; *Musselman v. Commonwealth*, 7 Pa. St. 240; *McMicken v. Commonwealth*, 58 Pa. St. 213; *Giltinan v. Strong*, 64 Pa. St. 242; *Tracy v. Goodwin*, 5 Allen, 409; *Dennie v. Smith*, 129 Mass. 143; *City of Lowell v. Parker*, 10 Met. 309; *Dane v. Gilmore*, 51 Me. 544; *Tute v. James*, 50 Vt. 124; *State v. Colerick*, 3 Ohio, 487.

It has been held in this state that a judgment against an administrator is conclusive upon the sureties upon his official bond. *Balch v. Hooper*, 32 Minn. 158. Why should not the same rule apply in the case at bar?

This action was tried in the District Court upon the theory that the judgment against the sheriff was not conclusive, but only *prima facie* evidence against the sureties and on that theory of the law plaintiff obtained the verdict. In support of the theory upon which this action was tried we cite the following authorities; *Stephens v. Shafer*, 48 Wis. 54; *People v. Mersereau*, 74 Mich. 687; *People v. Schuyler*, 4 N. Y. 173; *Miller v. Rhodes*, 20 Ohio St. 494; *Charles v. Hoskins*, 14 Ia. 471; *Munford v. Overseers*, 2 Rand. 313; *Carr v. Mead*, 77 Va. 142; *State v. Woodside*, 7 Ired. 296; *State v. Cason*, 11 S. C. 392; *Taylor v. Johnson*, 17 Ga. 521; *Atkins v. Bailey*, 9 Yerg. 111; *Mullen v. Scott*, 9 La. Ann. 174; *Fay v. Edmiston*, 25 Kans. 439.

To recapitulate; the states of Massachusetts, Pennsylvania, Maine and Vermont hold the judgment conclusive in the premises. Wisconsin, Michigan, New York, Ohio, Iowa, Virginia, North Carolina, South Carolina, Tennessee, Georgia, Louisiana and Kansas hold it *prima facie* evidence, and only California, Indiana and Alabama sustain defendants and hold the judgment no evidence at all.

**COLLINS, J.** The real questions involved in this appeal are whether in an action brought against sureties in an official bond, given by a sheriff, and conditioned for the faithful performance of the duties of his office, (1878 G. S. ch. 8, § 193,) a judgment which has been ren-

dered against such sheriff for official misconduct is admissible in evidence, and also, if it be admissible, to what extent are the sureties bound. A great number of decisions have been cited upon the subject, and there is much diversity of opinion as to the effect of such a judgment. In some of the states it is held that it is of no value as against sureties, and hence inadmissible in evidence in an action brought to enforce a liability upon the bond. *Pico v. Webster*, 14 Cal. 203; *Lucas v. Governor*, 6 Ala. 826; *Governor v. Shelby*, 2 Blackf. 26; *Carmichael v. Governor*, 3 How. (Miss.) 236. It is well argued in these cases that such a judgment is *res inter alios acta*, and therefore of no effect in an action against sureties. In a very large number of states it has been determined that such a judgment is *prima facie* evidence in an action brought against and involving the liability of sureties upon an official bond. It was so declared in Massachusetts in 1845, the learned Chief Justice Shaw preparing the opinion, (*City of Lowell v. Parker*, 10 Metc. 309,) although in later cases the court departed from this doctrine, as will be seen upon an examination of the authorities hereinafter cited. That these judgments are at least presumptive evidence as against sureties upon an official bond has been held in *Stephens v. Shafer*, 48 Wis. 54, (3 N. W. Rep. 835;) *Norris v. Mersereau*, 74 Mich. 687, (42 N. W. Rep. 153;) *Graves v. Bulkley*, 25 Kan. 249; *Fay v. Edmiston*, Id. 439; *Charles v. Hoskins*, 14 Iowa, 472; *Mullen v. Scott*, 9 La. Ann. 174; *Miller v. Rhoades*, 20 Ohio St. 494; *Taylor v. Johnson*, 17 Ga. 521; *Carr v. Meade*, 77 Va. 142; *De Greiff v. Wilson*, 30 N. J. Eq. 435. We gather from *Thomas v. Hubbell*, 15 N. Y. 405, 35 N. Y. 121, that this rule also prevails in New York.

A variety of reasons have been given in support of this rule, and many of them were referred to and commented upon in *Stephens v. Shafer*, *supra*. We need not state them.

There is also a very respectable array of authorities which fully sustain the doctrine that, where a judgment is recovered against an officer for official misconduct, and against which sureties upon his bond have covenanted, it is absolutely conclusive on the sureties, in the absence of fraud or collusion, both as to the official misconduct and the extent of the damages. Among these cases may be

noted *Masser v. Strickland*, 17 Serg. & R. 354; *McMicken v. Commonwealth*, 58 Pa. St. 213; *Chamberlain v. Godfrey*, 36 Vt. 380; *Tracy v. Goodwin*, 5 Allen, 409; *Dennie v. Smith*, 129 Mass. 143,—both these Massachusetts cases are subsequent to *City of Lowell v. Parker*, *supra*.

While the authorities are wide apart upon the question, it is evident that the decided weight is in favor of the doctrine that a judgment against the principal upon an official bond is *prima facie* evidence against the sureties. By this rule the right is reserved to such sureties to interpose any defense they may have, and to be fully heard on the merits.

After a full examination of the authorities, in deference to the great weight in this direction, and believing that convenience and public policy require and will be promoted by its approval, we accept and adopt the *prima facie* doctrine. We admit that the rule first mentioned herein, declaring judgments against principals upon official bonds ineffectual as against sureties, is more easily sustained on principle. In fact the *prima facie* doctrine has less to justify it than that which makes a judgment against the principal conclusive upon his sureties, except where there has been fraud and collusion. There is some difficulty in standing upon the middle ground of presumption.

The counsel for appellants have cited and relied upon the very recent case of *Pioneer Sav. & Loan Co. v. Bartsch*, 51 Minn. 474, (53 N. W. Rep. 764.) We regard the views therein set forth as sound on principle, and rest satisfied with the conclusion therein reached; but for the reasons before mentioned we adopt the *prima facie* rule as the most practical and desirable one when official bonds are involved.

Order affirmed.

(Opinion published 56 N. W. Rep. 1065.)

**MAURICE F. WILLIAMS vs. ROBERT M. WOOD.**

Argued Nov. 2, 1893. Reversed in part Nov. 27, 1893.

No. 8541.

55	323
561	194
61	354
55	323
52LRA	53n

**Verdict supported by the evidence.**

Upon an examination of the evidence produced upon the trial of this action, it is *held* that it was sufficient to justify the jury in finding that it was agreed between plaintiff and defendant that a certain balance due from the former to the latter on account of a sale of land was to be applied upon the notes given to secure the chattel mortgage herein involved, and not upon other notes held by plaintiff against defendant.

**Evidence considered.**

*Held*, further, that plaintiff failed upon the trial to show default in, or a breach of, a condition of the mortgage whereby the defendant mortgagor had contracted and covenanted to pay over to the mortgagee one-half of the earnings of the mortgaged property by him collected in cash.

**Anticipated profits cannot be recovered as damages.**

*Held*, also, that the trial court erred in its rulings upon the admission of evidence, and in its charge to the jury in respect to the compensation defendant was entitled to by reason of an unlawful taking of the property in question by plaintiff.

Appeal by plaintiff, Morris F. Williams, from an order of the District Court of Clay County, *Frank Ives, J.*, made March 16, 1893, denying his motion for a new trial.

*John E. Greene* and *W. E. Purcell*, for appellant.

*C. A. Nye*, for respondent.

**COLLINS. J.** Action in claim and delivery to recover possession, or the value in case possession could not be had, of an outfit for threshing grain by steam power. The plaintiff claimed to be entitled to possession because of default in the conditions of a mortgage upon the property and upon one-half of the gross earnings thereof, executed and delivered by defendant and another person to secure the purchase price of the same, as evidenced by certain promissory notes, which mortgage and notes had been duly transferred and assigned by the original mortgagee and payee to plaintiff. The latter secured possession of the property at the com-



mencement of the action, and retained it at the time of the trial. In his answer defendant alleged payment of the notes in full, with interest, prior to the bringing of the action. Further answering, he set forth the taking of the property in question by the plaintiff in these proceedings in claim and delivery; and, further, that it had been detained by plaintiff from the time of the taking until the end of the threshing season for that year,—1892. It was then alleged that “the value of the use” of the outfit during said period of detention was a stated sum per day, whereby defendant had been damaged in a certain amount, for which judgment was demanded. These averments were put in issue by the reply.

On the trial it appeared that three notes, each of date August 25, 1891, were secured by the mortgage. One, for \$950, matured November 1, 1891, some 10 months prior to the commencement of this action; another, for the same amount, was to mature November 1, 1892, a few weeks subsequent to bringing of the action; while the third, for \$475, did not fall due until November 1, 1893. It will thus be seen that no default in payment as to the notes to mature in 1892 and 1893 had accrued when plaintiff brought his action.

The mortgage was in the usual form, except that it contained a stipulation to the effect that, should the mortgagors refuse or neglect to pay over to the mortgagee, without demand therefor, as fast as collected in cash, one-half of the earnings of the property, whether the notes were due or not, or if the mortgagors should use the earnings for any purpose other than the payment of actual expenses incurred in the work or of the debt secured, then all of the notes, both principal and interest, should, and without notice, become due and payable at once, and the mortgaged property might be seized for the purpose of foreclosure.

It was admitted that in the fall of 1892 defendant threshed a large quantity of grain belonging to plaintiff, for which he was to have credit on one of his notes. There was some dispute about the amount due for this, but, on the argument here, counsel for plaintiff concedes defendant's figures,—\$319. Later, in March, 1892, defendant sold to plaintiff 320 acres of land, at an agreed price of \$13 per acre,—a total of \$4,160. This land had been purchased from the state, and a small part only of the price had been

paid. Certificates had been issued by the authorities, but these were in the hands of a third party as security for a debt due from defendant. It was agreed that plaintiff should pay the debt, and obtain the certificates; should also pay the amount due to the state as the balance of the purchase price; and should also pay certain taxes due upon the land. This was done, and thereupon the account growing out of the land transaction stood thus: Agreed price of the land, \$4,160. Plaintiff had paid thereon, to obtain the certificates, \$593.75; as taxes on the land, \$37; as balance due to the state, principal and interest, \$1,700,—an aggregate of \$2,330.75, as of date March 28, 1892. The balance due from plaintiff on the land was \$1,829.25. To this should be added the amount of defendant's bill for threshing plaintiff's grain,—\$319; the total sum being \$2,148.25. At the date before mentioned, March 28, 1892, the principal of the secured notes was \$2,375; accrued interest, \$140.50,—total \$2,515.50. If, then, the balance due to defendant on the land trade was, as he claims, to be applied upon the notes secured by the chattel mortgage, there remained unpaid upon these notes at the date last aforesaid a balance of \$367.25, no part of which was due, unless defendant had made default, or had violated some of the conditions of the mortgage, as plaintiff claims he had. Reference to this claim will be made hereafter.

We have stated defendant's position as to the balance due to him upon the land deal,—that it was to be applied on the secured notes. The plaintiff contended upon the trial, however, that this was not the fact. He held other notes and demands against the defendant, and claimed that there was no agreement to apply the balance on any particular note or demand, but simply that it was to be applied on defendant's indebtedness. Insisting upon his right to apply it as he chose, in the absence of an agreement or a designation by defendant, the plaintiff had applied this balance—First, in full satisfaction of other notes held by him against the defendant and other persons; and, second, in part payment of the secured note which fell due November 1, 1891.

There was a square issue, on the evidence, between the parties, as to whether there was an agreement in respect to the application of the balance due to defendant upon the sale of his land. He testified plainly and positively that there was; that he sold the land to pay the

notes secured by the chattel mortgage; and that plaintiff agreed to apply the balance in satisfaction of those notes. To arrive at the verdict rendered in this action, the jury must have accepted and believed the defendant's version of the contract, and they were abundantly justified in so doing; so that we accept the verdict as conclusively settling this issue of fact, and as forever determining that the amount for which defendant sold his land, less the sums which plaintiff was to pay and did pay to third parties, was to be and must be allowed and credited to defendant upon the notes secured by the mortgage. This, with the amount due upon the threshing bill, wiped out his indebtedness upon the first two notes of the series, and left unpaid as of March 28, 1892, and as a balance yet to be paid on the note maturing in 1893, \$367.25, as before stated. Our figures do not agree with those made by either of the counsel, but we regard them as correct, and those only which are fully justified by the testimony.

As the balance of the third of the series of notes did not fall due, according to its terms, until the fall of 1893, it is obvious that, simply because there remained an amount unpaid, the plaintiff had no right to immediate possession, or to bring this action in September, 1892. Unless some other condition of the mortgage had been broken, this proceeding was premature.

It was conceded on the trial that plaintiff took the notes subject to all equities or defenses which would have availed the defendant had they remained in the hands of the original payee. The defendant was permitted, the plaintiff duly excepting, to show that he did not receive certain articles which he had bought with and as part of the outfit, of the value of \$60, and that, by agreement, he returned to plaintiff a self-feeder, of the value of \$175, which had been included in the amount for which the notes were given. There was no allegation in the answer under which this evidence could properly be received. But the court corrected its error when admitting proof on this point, in its charge to the jury, by stating that neither of these items could be considered as payments upon the notes, or as a defense to the action.

It was contended by the plaintiff on the trial that defendant had defaulted in the condition found in the mortgage making it his duty, without demand being made upon him, to pay over to

plaintiff one-half of the earnings of the threshing machine as fast as collected in cash. Of course, it was incumbent upon the plaintiff to establish this default by a preponderance of evidence. He testified that none of the earnings had been paid to him, but, aside from this, the only testimony bearing upon the point was that of a man who ran the machine about six weeks just before the commencement of this action. His testimony was exceedingly meager, and to the effect that defendant had the net proceeds of the work done, a stated sum per day; that is, said the witness, the proceeds "went to his benefit." This did not prove that defendant had collected any of the earnings in cash. If plaintiff expected to rely upon a breach of this special condition in the mortgage, he should have shown this breach by competent proof, and not left it to be surmised or conjectured from the scant statement of a witness that the net earnings for a period of time "went" to defendant's benefit. Again, it will be noted that defendant threshed the grain upon plaintiff's farm, thus earning over \$300, all of which remained in the hands of the latter, and must be considered when determining the question of a breach of this particular condition. In fact, the court charged the jury, in effect, no exception being taken, that this condition in the mortgage could only be regarded should they find that defendant had collected in cash and from other persons a greater sum than the amount of the threshing bill due from plaintiff.

The plaintiff failed to show any default or breach in this particular condition, and therefore had no cause of action arising from such default or breach. Taking this in connection with the fact that, upon completion of the land trade, defendant was no longer in default, but had anticipated his payments, it follows that, when instituting this action, plaintiff was not entitled to possession of the mortgaged property.

A single point remains for consideration, and that relates to the matter of damages. The jury found that, by reason of the unlawful detention, the defendant had sustained damages in the sum of \$375. But we are obliged to say that the court erred in its rulings on the admission of testimony, and also in its charge to the jury. The defendant was permitted to state the amount of his damages upon the basis referred to and commented upon in *Cushing v. Seymour*,

30 Minn. 301, (15 N. W. Rep. 249;) that is, he estimated the value of the use of the property to him by taking into consideration certain contracts which he had made for threshing, and which he could not perform after the machinery was taken away. These were clearly anticipated profits, and too conjectural and uncertain to furnish a proper basis for estimating compensation to defendant; and it is apparent that the same element entered into nearly all of the estimates made by defendant's witnesses. And, in charging the jury as to the measure of damages, the court really permitted these anticipated profits to be considered, although it attempted to confine the jury to the reasonable value of the use of the property. To illustrate, it refused to distinctly charge, as requested by plaintiff's counsel, that profits which might have been made had defendant performed particular contracts which he had when the outfit was taken were too conjectural and uncertain to furnish a proper basis for an award of damages to defendant. This request should have been given without the slightest modification. *Cushing v. Seymour, supra.*

We are satisfied that upon every other point in the case substantial justice has been done, and that a retrial of all issues is unnecessary. The order appealed from is reversed in so far as to allow a new trial, for the sole purpose of assessing the amount of compensation to which defendant is entitled for the detention of the property by plaintiff.

(Opinion published 56 N. W. Rep. 1066.)

STATE OF MINNESOTA *vs.* CHARLES B. JONES.

Submitted on briefs Nov. 20, 1893. Reversed Nov. 29, 1893.

No. 8544.

**Misspelling names disregarded if not misleading.**

The names Johnson and Johnston are *idem sonans*, (sounding the same.) Absolute accuracy is not required in spelling names in legal proceedings, especially when the difference in spelling is not misleading.

**Proof of service of notice of appeal.**

Where a county attorney appears in a criminal action, on behalf of the state, before a Justice of the Peace, and the Justice's record shows that fact, an affidavit of the service of a notice of appeal upon such county attorney need not designate him as such county attorney if in fact he held such office at the time of the service of such notice.

Appeal by defendant, Charles B. Jones, from a judgment of the District Court of Becker County, *D. B. Searle, J.*, entered August 28, 1893.

Complaint was made June 14, 1893, by Eli Holder before W. W. Rossman, a Justice of the Peace at Detroit, that defendant did on June 1, 1893, at the Township of Burlington obstruct a public highway on section eleven (11) in that Township by building a fence therein. A warrant was issued, defendant was arrested, plead not guilty, waived a jury, was tried, convicted and sentenced to pay a fine of \$5 and costs, taxed at \$21. On June 16, 1893, defendant filed an affidavit for appeal and gave bond with sureties. He also on the same day served notice of appeal upon C. M. Johnston, County Attorney, and made affidavit thereof and filed the notice and proof of service with the Justice. In the notice and in the proof of service the letter "t" was dropped from the attorney's name. He was not described in the proof of service as being County Attorney. The Justice made return to the District Court. On August 15, 1893, that Court on motion of the County Attorney dismissed the action for these defects and judgment of dismissal was entered. From that judgment defendant appeals.

*Warner, Richardson & Lawrence and E. C. Campbell*, for appellant.

Where two names have the same original derivation, or where one is an abbreviation or corruption of the other, but both are taken promiscuously, and according to common usage to be the same though differing in sound, the use of the one for the other is not material misnomer. *Gordon v. Holiday*, 1 Wash. C. C. 285; *Wilkinson v. State*, 13 Mo. 91; *Edmundson v. State*, 17 Ala. 179; *State v. Johnson*, 26 Minn. 316; *Robson v. Thomas*, 55 Mo. 582.

The application of the doctrine of *idem sonans* has been of late years much extended, and now the courts hold that a variance, to be material, must be such a one as has misled the opposite party to his prejudice. *Stevens v. Stebbins*, 3 Scam. 25; *Belton v. Fisher*, 44 Ill. 32; *Trimble v. State*, 4 Blackf. 435; *Myer v. Fegaly*, 39 Pa. St. 429; *Cutting v. Conklin*, 28 Ill. 506; *Barnes v. People*, 18 Ill. 52; *McDonald v. People*, 47 Ill. 533; *Belton v. Fisher*, 44 Ill. 32; *Galveston, H. & S. A. Ry. Co. v. Daniels*, 1 Tex. Ct. App. Civ. 695; *Miltonvale State Bank v. Kuhnle*, 50 Kans. 420; *Chiniquy v. Catholic Bishop of Chicago*, 41 Ill. 148; *Guertin v. Mombleau*, 144 Ill. 32; *Rivard v. Gardner*, 39 Ill. 125; *Lane v. Innes*, 43 Minn. 137; *State v. Sannerud*, 38 Minn. 229; *State v. Timmens*, 4 Minn. 325; *Newton v. Newell*, 26 Minn. 529.

The affidavit was made and filed during progress of the litigation and consequently its language was to be interpreted by the company it kept. Nothing short of a positive affidavit of no service should have been regarded as sufficient to warrant belief that the C. M. Johnson mentioned in the affidavit of service referred to any person other than the County Attorney. *Bandy v. Chicago, St. P., M. & O. Ry. Co.*, 33 Minn. 380; *Conklin v. Keokuk*, 73 Ia. 343.

*H. W. Childs*, Attorney General, and *C. M. Johnston*, for respondent.

The District Court followed the precedents laid down by this Court and gave the statute regulating appeals the same construction that this Court has put upon it, and held that the filing of an affidavit showing that the notice of appeal had been served upon the County Attorney, or in his absence upon the Clerk of the Dis-

trict Court, was a jurisdictional prerequisite, and that in the case at bar the terms of the statute had not been complied with. *Stolt v. Chicago, M. & St. P. Ry. Co.*, 49 Minn. 353.

The names "C. M. Johnson" and "C. M. Johnston" are not *idem sonans*. *King v. Shakespeare*, 10 East, 83; *Rex v. Calvert*, 2 Crompt. & M. 189; *Wittwell v. Bennett*, 3 B. & P. 559; *Atwood v. Landis*, 22 Minn. 558.

BUCK, J. Upon complaint made before a Justice of the Peace a warrant was issued, and the defendant, Jones, was arrested upon a charge of obstructing a public highway. He was convicted, and fined \$26, including costs, and judgment rendered against him for that amount. The Justice certifies that upon the trial in his court the county attorney, C. M. Johnston, appeared for the state. From this judgment Jones appealed to the District Court of Becker county, in this state. The notice of appeal is directed to W. W. Rossman, the Justice before whom the cause was tried, and to C. M. Johnson, county attorney. The true name of the county attorney is C. M. Johnston, as appears from the record.

On the opening day of the general term of the District Court of Becker county in July, 1893, C. M. Johnston, appearing as such county attorney in behalf of the state, moved that the appeal be dismissed on the ground that it appeared from the affidavit of service of notice of appeal to the District Court that said notice had been served upon C. M. Johnson, and not upon C. M. Johnston, county attorney, which motion was resisted by the defendant. The court, however, granted the motion. There was no dispute but what the notice was in fact served upon C. M. Johnston, the county attorney, but he then insisted, and now insists, that his surname should be spelled with a "t," and that he should have his official title, "County Attorney," attached to his name. The rights of a citizen and his personal liberty are sought to be determined upon these technical and whimsical objections. It is a familiar rule that absolute accuracy is not required in spelling names in legal proceedings, and great latitude is tolerated by the courts in cases where the difference in spelling is not misleading. In *Robson v. Thomas*, 55 Mo. 581, it is stated as the law: "It matters not how the names are spelled,—what their orthography is. They are *idem sonans*



within the meaning of the books if the attentive ear finds difficulty in distinguishing them when pronounced, or common and long-continued usage has by corruption or abbreviation made them identical in pronunciation." In the very recent case of *Miltonvale State Bank v. Kuhnle*, 50 Kan. 420, (31 Pac. Rep. 1057,) it was said by the court that "it would take a practiced ear to detect the difference in the sound of Johnston and Johnson as ordinarily pronounced by the generality of mankind," and it was held that these names were *idem sonans*. No one could possibly be misled in this case, and it is not claimed that any one was misled in any particular. There is no merit in this point, and it is overruled without further discussion.

The next point is this: That the affidavit of the service of notice does not show that it was served upon C. M. Johnston, county attorney, the latter words being omitted from the affidavit of service.

The record shows that C. M. Johnston was county attorney, and appeared as such on the trial of this action in the Justice Court, June 15, 1893, and appeared as such county attorney in the District Court in the month of July, 1893, and moved to dismiss this action. It is fair to presume, then, that he was county attorney during the time between those dates, and that he was such county attorney on the day when the notice of appeal was served upon him, viz. June 16, 1893. It is not claimed that proper notice of appeal was not duly served upon him, but that the proof does not show this fact. An act of congress authorized the service of process upon any director of a railroad company, and the marshal made return that he had served process on "J. S.," reputed to be one of the directors of the company; but the record showed that he was a director before that time, and, in the absence of proof to the contrary, it was held that it would be presumed that the relations existed when the summons in the case was served. *Railroad Co. v. Brown*, 17 Wall. 445.

The respondent cites various authorities to sustain his position that the filing of an affidavit showing that the notice of appeal had been served upon the county attorney is a jurisdictional proceeding. *Stolt v. Chicago, M. & St. P. Ry. Co.*, 49 Minn. 353, (51 N. W. Rep. 1103,) and cases cited. But we think that it was not necessary to add the words "county attorney" after his name in

the affidavit of the service of notice of appeal upon him, such official designation not being necessary, as such service was made upon the county attorney in fact. Besides this, the cases cited were proceedings in civil, not criminal, actions. In appeals from a justice's court in a civil action, the terms of the statute that the original notice of appeal with proof of service thereof shall be filed with the Justice who rendered the judgment appealed from within ten days after such service is made, do not appear in the title relating to criminal actions. The only absolute prerequisite for the allowance of appeal from a conviction and judgment in a criminal action in a Justice's court are that a proper recognizance be executed, and that a notice of appeal be served upon the county attorney, stating the grounds of appeal. Upon compliance with these provisions the Justice must allow the appeal. As to how or when such proof of the service of notice of appeal is to be made, or when or where the same is to be filed, the law is silent. The notice of appeal must be served within ten days after conviction. As to what constitutes such proof—whether oral proof or by affidavit—does not appear, unless by implication or presumption; nor is it necessary for us to decide what would be a necessary and proper proof required by statute in such cases, nor when or where the same is to be filed, as we only refer to this phase of the case to show that the imperative terms as to filing the notice of appeal and proof of service thereof with the Justice are not used in the law in regard to appeals in criminal cases as in civil cases. The proof of service was satisfactory to the Justice who allowed the appeal, as C. M. Johnston appeared as such county attorney before him in behalf of the state, and tried the case, and courts take judicial notice of who are the county officers in their own county. There was a substantial and legal compliance with the law on the part of the defendant in perfecting his appeal, and the attempt to deprive a citizen of a fair trial upon a criminal charge upon such technical grounds is not commendable.

The judgment rendered in the district court in this case against the defendant is reversed.

(Opinion published 56 N. W. Rep. 1068.)

**ANNA BAHNSEN vs. JOHN GILBERT.****Argued Oct. 31, 1893. Reversed Nov. 29, 1893.****No. 8179.**

**The holder of a Note is presumed to own it.**

The payee and holder of a promissory note is presumptively its owner.

**Findings of fact defective. Application to correct.**

A finding by the trial court that the allegations of fact in the complaint are true is insufficient and defective when there are issues raised by the answer which the evidence tends to support to be passed upon. The rule that an application should be made in such case to the court for amended findings does not apply where there is no opportunity to make such application.

**A Judge who did not hear a case cannot decide it.**

The successor of the trial judge is not authorized or warranted in deciding, or in making findings of fact in, a case not tried by him.

**If the Judge who heard the trial fail to decide it.**

And where, in such case, material issues are not passed upon and disposed of on the trial of the cause, it is deemed a mistrial, and another trial must be had.

**The successor in office of the Judge may settle a case.**

A district judge may settle the case in an action tried by his predecessor.

**Errors in settling it how corrected.**

Irregularities in settling a case cannot be reviewed on appeal from the judgment.

Appeal by defendant, John Gilbert, from a judgment of the District Court of Polk County, *Ira B. Mills, J.*, entered January 13, 1893.

On January 29, 1889, defendant made his promissory note for \$500 and interest at ten per cent. a year payable on December 1, 1889, to the order of plaintiff, Anna Bahnsen. He delivered it to her deceased husband for her and afterwards paid \$232.85 thereon. She brought this action October 23, 1891, on the note to recover the balance. The defendant answered that on the date of the note he owed plaintiff's husband, Doctor W. J. Bahnsen, \$235 for medical services and borrowed of him that day \$230 in money and gave

to him the note in suit, bearing interest at 10 per cent. a year. That \$35 thereof was a bonus for making the loan and for giving further time for payment of the debt and that the note was for that reason usurious and void. Plaintiff replied denying the usury. The issues were tried March 19, 1892. A jury was waived. Findings were not made and filed until December 28, 1892. They were as follows;

"I find as matters of fact that all the allegations of fact in the complaint are true. As conclusions of law, that plaintiff is entitled to judgment against defendant for \$321.40 with interest at ten per cent. a year from March 1, 1890, with costs and disbursements. Let judgment be entered accordingly."

No application was made for further findings. The Judge's term of office expired on January 1, 1893. Notice was given, the costs taxed and judgment entered January 13, 1893, for \$430.85. Defendant gave bond and served notice of appeal to this Court on January 28, 1893. He made a case and on February 25, 1893, served a copy and gave notice that he would on March 6, 1893, present it for settlement before Hon. *Frank Ives*, successor of Hon. *Ira B. Mills*. On that day plaintiff appeared and objected that the time for serving and settling a case had gone by, that judgment had been entered, an appeal taken, and that Judge *Mills* who heard the trial had gone out of office. Judge *Ives* overruled the objections and made an order that the transcribed shorthand notes of the stenographer, taken at the trial, be allowed and filed as the case in the action; and he made a certificate that the case so made contained all the evidence given and exceptions taken on the trial. The Clerk of the District Court returned to this Court a certified copy of the judgment roll with the case attached, together with all the notices, orders and files in the action. The plaintiff made no motion in this Court to correct or strike out any part of this return. The appeal was set for argument here, without objection, and upon the day appointed was argued upon the merits.

*A. C. Wilkinson*, for appellant.

The finding of the Court that the allegations of the complaint are true does not find upon all the questions at issue in this action, because all the allegations of the complaint may be true and yet

the note be usurious. The defendant is entitled to have that question, presented by his answer, passed upon by the Court. For this reason the judgment should be reversed.

The District Court retains jurisdiction to allow amendments to the record, and to settle a case after an appeal has been taken, but before the return has been made and sent to the Supreme Court. *Pratt v. Pioneer Press Co.*, 32 Minn. 217; *State S. & D. Manuf'g Co. v. Adams*, 47 Minn. 399; *Swanstrom v. Marvin*, 38 Minn. 359.

*A. A. Miller*, for respondent.

The Court finds all the allegations of the complaint to be true. This was a sufficient finding to sustain the judgment. *School Dist. v. Wrabeck*, 31 Minn. 77.

The remedy for failure of the Court to find upon a material issue in a case tried before it, is by motion for an amendment of the findings. *Conklin v. Hinds*, 16 Minn. 457; *Warner v. Foote*, 40 Minn. 176; *Williams v. Schembri*, 44 Minn. 250; *Shulte v. First Nat. Bank of M.*, 34 Minn. 48; *Smith v. Pendergast*, 26 Minn. 318; *Slosson v. Hall*, 17 Minn. 95.

**VANDEBURGH, J.** The action is upon a promissory note executed to plaintiff by defendant, upon which a balance is claimed to be due.

The defendant alleges that the consideration of the note moved from the husband of the plaintiff, and that the face of the note, which bears interest at ten per cent., covers the sum of \$35, not actually received by him but which was included in the amount thereof as a bonus or usurious charge for the use and forbearance of the sum loaned in addition to the ten per cent. rate of interest called for by the note.

The case was tried without a jury, and the court found generally "as matters of fact that all of the allegations of fact in plaintiff's complaint are true." This included the issue of the ownership of the note by plaintiff. The fact of its execution to her and of its possession was sufficient evidence of that, and of her right to sue upon it.

But there is no finding covering the allegations of usury made in the answer and denied in the reply. There is evidence in the case tending to support the defendant's allegations upon this issue.

And if the note was given for indebtedness due to the husband of plaintiff and money advanced by him, or even if the money was due to her, if he had full discretionary power in the matter, the mere fact that the note ran to her would not cut off the defense of usury. The findings are therefore incomplete. It is suggested, however, by the plaintiff's counsel that defendant's remedy (the case having been tried by the court) was to have followed the rule laid down in *Warner v. Foote*, 40 Minn. 177, (41 N. W. Rep. 935,) applied in cases tried by the court, on the ground that the trial court in such cases may amend its findings upon the proper application, which should be duly made to that court, and which was not done in this case. But the conclusive answer to this objection is that there was no opportunity to apply to the judge who tried the case, because his official term expired so soon after the decision was filed that there was no opportunity to make such application. His successor could not decide or make findings in a case not tried by him. So the case must stand as an exception to the rule referred to, and on the same basis as if tried by a jury, and an incomplete special verdict rendered.

In other words, the issues not being disposed of, there was a mistrial. *Pint v. Bauer*, 31 Minn. 7, (16 N. W. Rep. 425;) *Crich v. Williamsburg City Fire Ins. Co.*, 45 Minn. 444, (48 N. W. Rep. 198,) and cases cited. The case, though made and settled after judgment, was in time, and was properly included in the return subsequently made to this court, notwithstanding the fact that the notice of appeal had already been served.

We see no reason why the successor of the trial judge who tried the case was not competent to settle the proposed case, which was done upon due notice, and after hearing the parties, upon the stenographer's minutes of the evidence and proceedings upon the trial.

It is also objected that the application to settle the case should not have been entertained, because the time for making a case had then passed by. This objection cannot be sustained. We do not, of course, hold that the trial judge could arbitrarily disregard the statute, though he might, upon a proper showing, in his discretion, relieve a party from his default. But the error complained of is one which affects no substantial right, and it will not be considered on appeal from the judgment. Besides, if the case was not proper-

ly made a part of the record, the plaintiff should have moved to strike it from the return. *Mower v. Hanford*, 6 Minn. 542, (Gil. 372.)

Judgment reversed, and new trial ordered.

(Opinion published 56 N. W. Rep. 1117.)

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CHARLES B. WRIGHT *vs.* WILLIAM W. NICHOLS *et al.*

Submitted on briefs Nov. 1, 1893. Affirmed Nov. 29, 1893.

No. 8311.

**Deed and mortgage for purchase money construed to be but one contract.**

N. purchased a town lot, and at the time of the execution of the deed paid part of the purchase price and executed to the grantor a purchase-money mortgage to secure the balance. The deed ran to N., "trustee for W. and C., party of the second part," and the mortgage was executed by N., "trustee for W. and C." *Held* that, whether the title to the property vested in N., or in W. and C. as beneficiaries, in either case the mortgage was a valid lien for the unpaid purchase money; and from the nature of the entire transaction, treated as indivisible, the grantee acquired the equity of redemption only.

Appeal by defendants, William W. Nichols, Clive Nichols and William W. Nichols, Jr., from an order of the District Court of Ramsey County, *Chas. E. Otis, J.*, made May 2, 1893, denying their motion for a new trial.

On November 1, 1884, the plaintiff, Charles B. Wright of Philadelphia, Pa., for \$800 sold and conveyed to "Aba C. Nichols of Neche, Dakota, trustee for William Nichols and Clive Nichols," lot seventeen (17) in block two (2) of Wright's rearrangement of blocks 22, 23, 24 and 25 in Anna E. Ramsey's Addition to St. Paul. She paid \$226 and gave to Wright her three promissory notes for \$178 each and interest, secured by a mortgage on the lot and dated that day, and all signed by her, "A. C. Nichols, trustee for Willie and Clive Nichols." In the body of the mortgage and in the notes she was named and described as "Aba C. Nichols of Niche, Dakota, trustee for William Nichols and Clive Nichols, party of the first part." She

died intestate July 29, 1886, leaving her surviving, her husband, the defendant William W. Nichols and her two children, the defendants, William Nichols and Clive Nichols, her sole heirs at law. The administrator of her estate paid two of the notes and this action was brought to foreclose the mortgage, sell the lot and out of the proceeds pay the remaining note. Harvey Officer was appointed guardian *ad litem* for the two children. He answered submitting their interests in the lot to the care and protection of the Court. At the trial on March 9, 1893, no evidence of any trust relation of Aba C. Nichols to her children was offered, other than the deed, notes and mortgage. The defendants contended that on the delivery of the deed the title to the lot vested immediately in the children, William Nichols and Clive Nichols, by virtue of the statute, 1878 G. S. ch. 43, § 5, and that the mortgage made by the trustee, Aba C. Nichols, was invalid, because she had no title to convey or mortgage. This contention was overruled by the Court. Findings of these facts were made and judgment for foreclosure and sale ordered. Defendants duly excepted, moved for a new trial, and being denied, appealed.

*Harvey Officer*, for appellants, cited *Thompson v. Conant*, 52 Minn. 208; *Hayes v. Crane*, 48 Minn. 39.

*James E. Markham*, for respondent.

VANDERBURGH. J. The court finds that on the 1st day of November, 1889, the plaintiff was the owner of a certain lot of land described in the complaint, and on that day, in consideration of the sum of \$800, purchase price, agreed to be paid to him by Aba C. Nichols, he executed and delivered a deed of conveyance thereof to her. Of the purchase money she paid the sum of \$266, leaving unpaid the sum of \$534, for which she at the same time executed three promissory notes for \$178 each, payable to the order of the plaintiff; and, contemporaneously with the execution of the deed and notes, the purchaser, Aba C. Nichols, for the purpose of securing the unpaid part of the purchase price so represented by the notes, executed and delivered to the plaintiff a mortgage upon the land described in the deed. Two of the notes have been paid, and this action is brought to foreclose the mortgage for the unpaid



balance of the purchase price represented by the third note. The mortgagor, Aba C. Nichols, died before the commencement of this action, and the defendants are her heirs at law. The notes were signed "A. C. Nichols, trustee for Willie and Clive Nichols." The mortgage was executed in the same way, and the deed ran to "Aba C. Nichols, trustee for Willie and Clive Nichols, party of the second part." The court rendered judgment for the plaintiff for the relief asked.

The appellants allege error chiefly on the ground that under our statute of uses no estate was vested in Aba C. Nichols, but that the deed must be construed as made in trust for Willie and Clive Nichols; and hence the estate passed immediately to them, and consequently there was no estate left in Aba C. Nichols which she could mortgage. At the trial the defendants claimed that the note and mortgage appeared on the face thereof to be the individual contracts of Aba C. Nichols, on the ground that there was no evidence that Mrs. Nichols was trustee, or entitled to execute contracts in a representative capacity, under the rule in *Peterson v. Homan*, 44 Minn. 166, (46 N. W. Rep. 303,) and cases cited, and objected to their admission in evidence on the ground that the mortgage was ineffectual as against the beneficiaries named in the deed. The court, however, held the mortgage valid and effectual as security for the unpaid purchase money. The defendants' counsel, as we understand, takes the position that, as respects the deed, no extrinsic evidence of the representative character of Mrs. Nichols was necessary or material, since the question is to be determined upon the face of the deed, and by virtue of the statute the trust was immediately executed; and that in such cases the words "trustee for" must be construed to mean the same as "in trust for" or "as trustee for." We will admit that it is hard to make any distinction between these terms in such a case, but, conceding that the terms here used disclose an intention on the part of Mrs. Nichols to take the deed in trust, yet we think that the result reached by the court was right.

The execution of the deed and mortgage constituted together one transaction between the same contracting parties. The intention of the parties is clear. She executed the mortgage apparently in the same capacity in which she was named in the deed. If she was

in fact a trustee, and authorized to make the purchase, and was acting in a representative capacity, the mortgage is good; and if she was not acting in a fiduciary relation, but in her individual capacity, and of her own motion elected to take the deed in this form, still the court will give effect to the manifest intention of the parties as gathered from the instrument and the nature of the transaction, and will not permit the mortgage to fail, but will declare, as in other cases of purchase-money mortgages between the parties to a contemporaneous deed, that the grantee or beneficiaries (if the trust be deemed executed) became vested with the equity of redemption only.

Order affirmed.

(Opinion published 56 N. W. Rep. 1118.)

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DULUTH LOAN & LAND CO. *vs.* SIMON KLOVDAHL *et al.*

Argued Oct. 16, 1898. Affirmed Nov. 29, 1898.

No. 8290.

**Defense to vendor's action for an intermediate installment of the purchase price.**

It is no defense to an action for the recovery of an installment, due from the vendee in a contract for the purchase of land that the same is incumbered, if such incumbrance may be removed by the vendor before the time fixed for the execution of the deed.

**Answer construed.**

The allegations in the answer herein *held* insufficient to show the insolvency of the vendors, or that the title of the land in question will not be marketable when the vendees, by the terms of the contract, shall be entitled to a deed.

Appeal by defendants, Simon Klov Dahl and William Carlson, from a judgment of the District Court of St. Louis County, *O. P. Stearns, J.*, entered September 23, 1892, against them for \$1,360.86.

The plaintiff, the Duluth Land and Loan Company, a corporation, brought this action upon six different contracts made by it with defendants April 14, 1891, in each of which it covenanted to convey to defendants with warranty two separate lots in Watson's Addi-

tion to South Superior, Wisconsin (in all twelve lots), on being paid in full therefor. The defendants covenanted in and by each contract to pay it \$500, as follows, \$125 on that date, \$184.34 in one year, and \$187.66 in two years thereafter (in all \$3,000), with interest annually until paid at the rate of eight per cent. a year. They also covenanted in each contract to pay all taxes and assessments and in case of its foreclosure to pay \$50 attorney's fees. The complaint stated that the interest and installments falling due on April 14, 1892, had not been paid and prayed judgment for \$1,305 and interest from the last mentioned date, with costs and disbursements.

Defendants answered that all the lots were incumbered with mortgages, that they had depreciated in value, and that defendants would not be safe in paying the sums due, that they had no knowledge that plaintiff was sound financially and were informed and believed that plaintiff would not be able to convey the lots free from incumbrance when the last payments should mature and that the stipulation for attorney's fees rendered each of the six contracts void for usury, and demanded that they be so adjudged, and if not, then that plaintiff be required to free the lots from all incumbrance before having judgment for the past due installments.

Plaintiff on notice moved the Court for judgment on the pleadings, and it was granted. Judgment being entered, defendants appeal.

*George L. Spangler*, for appellants.

*Pealer & Titus*, for respondent.

VANDEBURGH, J. This action is brought for the recovery of the second installment upon each of the certain land contracts set forth in the complaint, which became due on the 14th day of April, 1892. By the terms of the contract, the third and last installment would fall due on the 14th day of April, 1893. The plaintiff, vendor, covenanted therein that upon full performance by the defendant, including the payment of all the installments of the purchase money as agreed, it would convey the lands therein described to the defendant, party of the second part, by a good and sufficient deed, etc.

The fact that the lands are incumbered, or the title otherwise imperfect, when the contract is made, or at any time before the date fixed for its completion, will not, alone, constitute a defense to an action for the recovery of an installment falling due at any earlier

date, or a ground for a rescission of the contract, since such incumbrance or other defect may be removed within the time fixed for the completion of the purchase. *Townshend v. Goodfellow*, 40 Minn. 314, (41 N. W. Rep. 1056.)

If, at the time when, by the terms of the contract, plaintiff is required to execute a deed, the title is unmarketable, the defendant will not be required to take it, but may then rescind, and recover back the installments already paid, or may recoup or recover damages, as the nature of the case may warrant. *Moore v. Williams*, 115 N. Y. 586, (22 N. E. Rep. 233.)

In this instance, however, the defendant claims that it would be unsafe to make payment of the installment sued on, because of the incumbrances on the property, and the insolvency of the plaintiff, and insists that the court should interpose in his behalf for this reason.

It is enough, however, to say, in respect to the allegations in the answer, that they are entirely insufficient to support any such claim. There is no sufficient averment of the insolvency of the plaintiff, but it is alleged, generally, that the lands are covered with mortgages; but the amount of the incumbrance is not shown, and it does not appear that it is greater than that of the last installment, nor is it made to appear, from any allegations of fact in the answer, that the defendant may not seasonably remove the same.

The contract provides for a charge of \$50 for attorney's fees in case the contract is foreclosed by the plaintiff. Whether the court will allow this sum as additional costs in such an action, if it should be prosecuted, we need not determine here. But it does not make the contract usurious on its face. It is not presumptively a contract to pay this sum for the use or forbearance of money. Such stipulations have never been so treated in this state. *Johnston Harv. Co. v. Clark*, 30 Minn. 311, (15 N. W. Rep. 252;) *Bank of Benson v. Hove*, 45 Minn. 42, (47 N. W. Rep. 449.) And there is nothing in the answer tending to show that it was intended as a cover for usurious interest.

The answer was clearly insufficient, and the judgment must be affirmed.

(Opinion published 56 N. W. Rep. 1119.)

Application for reargument denied December 13, 1893.

GEORGE E. WILLIAMSON *vs.* ELEANOR W. HATCH *et al.*

Argued Oct. 27, 1893. Affirmed Nov. 29, 1893.

No. 8392.

**Transfers by insolvent debtor after petition filed.**

The filing of a petition for a receiver for an alleged insolvent debtor does not *ipso facto* avoid a transfer made by him after the petition and before the hearing.

**The knowledge of, or notice to, the purchaser is the material question.**

In an action to set aside such transfer the most material question is whether the purchaser or assignee had reasonable cause to believe that the debtor was insolvent when the transfer was made; and in considering the evidence of the circumstances and conduct of the debtor the rule in respect to the question of his insolvency is less stringently applied where he is not a "trader" or engaged in commercial or banking business.

**Findings supported by the evidence.**

The findings and decision of the trial court *had* justified by the record.

Appeal by plaintiff, George E. Williamson, from a judgment of the District Court of Hennepin County, *Thomas Canty*, J., entered May 29, 1893.

On March 4, 1891, Philo L. Hatch owned lots one (1), two (2) and three (3) in block fourteen (14) in Wells, Sampson & Bell's Addition to Minneapolis valued at \$100,000, but incumbered \$40,000. He was insolvent and owed over \$75,000 beside the mortgage. He and his wife, Eleanor W. Hatch, on that day gave their son, Raymond W. Hatch a power of attorney, authorizing him to sell and convey the property, and on the same day they removed from the State. On March 9, 1891, the son under this power sold and conveyed the property to the Home Savings and Loan Association for \$80,000 subject to the mortgage which it assumed to pay as a part of the purchase price. In further part payment the Association caused Fred A. Warner to make and deliver to Eleanor W. Hatch, the debtor's wife, his note for \$1,800 and interest and secure it by his mortgage to her on a part of lots six (6) and seven (7) in Hoyt's Addition to St. Anthony. Warner was owing the Association and at its request

gave this note and mortgage. She on June 25, 1891, assigned the note and mortgage to defendant Edson S. Gaylord in trust, to hold, collect or sell the same and out of the proceeds to pay Colyer S. Wentworth and William J. Graham \$1,200, and the Minneapolis Fuel Co. \$503.57, which sums Philo L. Hatch was owing them. On June 24, 1891, the National Bank of Commerce and George E. Williamson, creditors of Philo L. Hatch, filed their petition in the District Court of Hennepin County, under Laws 1881, ch. 148, § 2, asking the appointment of a receiver of his property. An order was made that day that he show cause why such receiver should not be appointed. He appeared and answered and such proceedings were had that on July 7, 1891, the plaintiff was duly appointed receiver of his property. He brought this action as such receiver, against Eleanor W. Hatch, Edson S. Gaylord, Colyer S. Wentworth, William J. Graham and the Minneapolis Fuel Company, to recover the Warner note and mortgage for \$1,800 and interest, claiming that they belonged in fact to Philo L. Hatch, and were taken in the name of his wife to hinder, delay and defraud his creditors, and that the assignment by her to Edson S. Gaylord was made at his request, after the petition for a receiver was filed against him, and with the purpose and intent on his part to give to Colyer S. Wentworth, William J. Graham and the Minneapolis Fuel Co. a preference over his other creditors, and that these creditors and Gaylord each and all then had notice and reasonable cause to believe that Philo L. Hatch was insolvent. Eleanor W. Hatch did not answer, all the other defendants denied any notice or knowledge, or cause to believe, that Hatch was insolvent when the note and mortgage were assigned to Gaylord. The issues were tried January 2, 1893. On the trial plaintiff offered to show, that on June 25, 1891, when Eleanor W. Hatch assigned the note and mortgage to Gaylord, there were several actions pending against Philo L. Hatch in the District Court of Hennepin County, claiming a fair inference might be drawn from this fact that the defendants had heard thereof. He also offered to show by Charles T. Thompson, a witness, that he had been one of the attorneys for Philo L. Hatch and knew of his indebtedness, and knew, when the sale was made to the Home Savings and Loan Association, that the securities received were taken in the name of either Hatch's wife or his daughter.

ter. Plaintiff then asked the witness if he knew why the securities were so taken. To this defendants objected, and the offers and evidence were all excluded and plaintiff excepted. This is the evidence mentioned at the close of the opinion.

The Court made findings that the defendants, other than Eleanor W. Hatch, had, at the time of the assignment of the note and mortgage to Gaylord, no knowledge or reasonable cause to believe that Philo L. Hatch was insolvent, that they accepted the transfer of the note and mortgage in good faith and did not know that they were thereby given a preference over other creditors, and ordered judgment for defendants. It was so entered and plaintiff appeals. The title to another of the securities taken on the sale, was involved in *Williamson v. Selden*, 53 Minn. 73.

*Flannery & Cooke*, for appellant.

The evidence excluded tended to show what means the preferred creditors and their trustee had to know, and what cause to believe, that Hatch was insolvent. *Forbes v. Howe*, 102 Mass. 427; *Wager v. Hull*, 16 Wall. 584.

The circumstances detailed in the testimony show that Gaylord had reasonable cause to believe that Philo L. Hatch was insolvent, but if not, it at least was sufficient to put him upon inquiry. *Holcombe v. Ehrmanntraut*, 46 Minn. 397; *Hastings Malting Co. v. Heller*, 47 Minn. 71; *Buchanan v. Smith*, 16 Wall. 277; *Scammon v. Cole*, 5 Bank. Reg. 257; *In re Forsyth & Murtha*, 7 Bank. Reg. 174.

Being put upon inquiry, he is chargeable with the knowledge which such inquiry would have furnished. *Daniels v. Bank of Zumbrota*, 35 Minn. 351; *Dow v. Sutphin*, 47 Minn. 479.

The filing of a petition for the appointment of a receiver in the office of the Clerk of the District Court is notice to the creditors receiving the transfer, and is reasonable cause to believe that the debtor is insolvent. The statute makes the filing of the petition in the office of the Clerk of Court notice to all. 1878 G. S. ch. 41, § 23; *Paulson v. Clough*, 40 Minn. 494.

It seems to us that the property of the insolvent passes to the assignee as of the date when the petition for his appointment was filed. *Beardslee v. Beupre*, 44 Minn. 1; *Ex parte Foster*, 2 Story,

131; *Ex parte Newhall*, 2 Story, 360; *McLean v. Lafayette Bank*, 3 McLean, 185; *Buchanan v. Smith*, 16 Wall. 277; *Bank v. Sherman*, 101 U. S. 403; *Conner v. Long*, 104 U. S. 228; *Glenny v. Langdon*, 98 U. S. 20; *Wickerham v. Nicholson*, 14 Serg. & R. 118; *Taffs v. Manlove*, 14 Cal. 47.

*Edson S. Gaylord, Jones & Babcock and Taylor & Woodard*, for respondents.

The pendency of suits and docketing of judgments cannot be shown by parol. And had defendants known of these suits, they could not be charged with notice that Eleanor W. Hatch was a party to the alleged attempts of Philo L. Hatch to defraud his creditors.

There was not, in the whole case, one particle of evidence to show that the defendants, the Minneapolis Fuel Co., or C. S. Wentworth & Co., or Edson S. Gaylord, had any knowledge or reasonable cause to believe that Philo L. Hatch was insolvent, or that they took the mortgage otherwise than in good faith, or with any attempt to obtain a preference. This presents a question of fact, and the burden of proof is on the plaintiff. The trial Court, after a full consideration of all the evidence, made the finding complained of, and this Court will not disturb it. Mere suspicion of insolvency is not enough. *Grant v. National Bank*, 97 U. S. 80; *Barbour v. Priest*, 103 U. S. 293.

In order to recover in this action plaintiff has the burden of showing that Philo L. Hatch was insolvent, that defendants knew that fact, or some fact from which insolvency would be presumed, that by the transfer in question Hatch intended to make a fraudulent preference, that defendants accepted the preference knowing these facts and intending thereby to obtain a preference, and that defendants knew of the alleged fraudulent making of the mortgage to Eleanor W. Hatch: *Baumann v. Cunningham*, 48 Minn. 292; *Hoover v. Greenbaum*, 61 N. Y. 305.

Unlike the United States bankruptcy law, our insolvency law does not forbid conveyances after proceedings commenced, or make the commencement of proceedings for a receiver notice to third parties. *Graham v. Evans*, 39 Minn. 382; *Paulson v. Clough*, 40 Minn. 494.



Under statutes like ours, it is held that when a debtor executes a mortgage to a *bona fide* creditor with the design of hindering and delaying other creditors, without any participation on the part of the creditors preferred and without any knowledge on their part of the fraudulent plans of the mortgagor, such mortgage will not be fraudulent. *Kohn v. Clement*, 58 Ia. 589; *Ayers v. Adams*, 82 Ind. 109; *Inglehart v. Willis*, 58 Tex. 306; *Crabb v. Morrissey*, 31 Neb. 161; *Stroff v. Swafford*, 81 Iowa, 695; *Baumann v. Cunningham*, 48 Minn. 292; *Farrington v. Stone*, 35 Neb. 456; *Blake v. Boisjoli*, 51 Minn. 296.

VANDERBURGH, J. There are but three questions in this case requiring particular notice.

1. The petition for the appointment of a receiver of the estate of Philo W. Hatch was filed the day before the assignment of the securities made in trust and for the benefit of the defendants the Minneapolis Fuel Company and Wentworth & Co., creditors of Hatch, but the hearing thereon and the appointment of the receiver took place after such transfer.

The filing of the petition did not *ipso facto* avoid the transfer. The case of *Beardslee v. Beaupre*, 44 Minn. 1, (46 N. W. Rep. 137,) only decides that the date of filing the petition should be deemed the initiation of the proceedings in insolvency, and the date from which the limitation for the avoidance of preferential conveyances should be computed, and has no application to this case.

Until an assignment made, or the appointment of a receiver, the title of his property would still remain in the insolvent, and it could be transferred unless inhibited by the statute; and under Laws 1881, ch. 148, § 4, such transfers are only made void within the time limited when made to creditors or persons "who shall have reasonable cause to believe that such debtor was insolvent."

2. It follows that the most material question in the case is whether the creditors of Hatch, defendants herein, had reasonable cause to believe that he was insolvent when the transfer complained of was made. Hatch was not a "trader" or merchant, but a practicing physician, and in such cases the term "insolvency" is ordinarily held to have a less restricted meaning than when applied to bankers, traders, etc., *Daniels v. Palmer*, 35 Minn. 350, (29 N. W.

Rep. 162;) and this circumstance is entitled to some weight in considering the evidence, relied on by the plaintiff, of facts and circumstances indicating Hatch's insolvency. Upon examination of the record, we are satisfied that it is not thereby indisputably made to appear that the defendants had reasonable cause to believe him insolvent at the time of the transfer. The question was fairly one for the trial court, and its determination cannot be disturbed.

3. The evidence ruled out on defendants' objection was inadmissible, because it did not reasonably tend to support the issue on trial before the court.

Judgment affirmed.

(Opinion published 57 N. W. Rep. 56.)

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WALTER J. SCASE *vs.* GILLETTE-HERZOG MANUF'G Co.

Argued Oct. 12, 1893. Reversed Nov. 29, 1893.

No. 8549.

**Contract of employment construed.**

The defendant entered into an agreement with plaintiff for his services for a term of three years, at a stipulated monthly salary, and as further compensation he was thereby also allowed a percentage of the profits of defendant's business, defined in the agreement as two and a half per cent. of the dividend declared for each year, which provision was further explained by a subsequent clause, in which it was provided that the plaintiff should receive his percentage on the balance of the profits after deducting expenditures for betterments upon the manufacturing establishment of the defendant, in which he was employed. *Held* that, in order to ascertain the meaning of the contract, the several clauses must be construed together, and that, so construed, the plaintiff was thereby entitled to have his percentage computed each year upon the net profits subject to dividend, under the contract, and that his right thereto could not be defeated by the omission of the company to declare a dividend of the whole or any part of such profits among the stockholders.

**Receipt of part not a bar to a recovery of the balance.**

*Held*, also, that the mere receipt by him of a portion of the percentage of profits due him for any year did not preclude him from claiming the balance due, when ascertained.

Appeal by plaintiff, Walter J. Scase, from an order of the District Court of Hennepin County, *William Lochren, J.*, made March 25, 1893, sustaining a demurrer to his complaint.

The defendant, the Gillette-Herzog Manufacturing Company, a corporation, on March 25, 1890, entered into the contract with plaintiff mentioned in the opinion. The complaint alleges that defendant declared a dividend of \$18,000 for each of the years 1890 and 1891, but that the net profits, after deducting betterments, were for 1890 \$25,000, and for 1891 \$30,000, and for 1892 \$100,000. That he was paid \$70 per month and \$900 on his percentage of the profits, and no more. That \$2,975 remain due to him. He demanded judgment for that sum with interest. The defendant construing the contract to be a promise to pay two and a half per cent. on the amount of the dividends actually made, and not upon the actual net profits of the business, demurred to the complaint. The trial Court so construed the contract and sustained the demurrer. Plaintiff appeals.

*Hall & Fletcher*, for appellant.

*Kellogg & Lybourn*, for respondent.

VANDERBURGH, J. The defendant, a corporation engaged in an extensive manufacturing business of architectural ironwork, employed the plaintiff as an accountant, and in other duties, as required by the defendant, from January 1, 1890, to January 1, 1893, under a special contract between them, by which plaintiff was to receive the sum of \$70 per month for his services, payable monthly.

And it was further agreed, in and by the contract, "that the said the Herzog Manufacturing Company, for each and every year of said three years that plaintiff should remain in its said employment, and in consideration thereof, should pay the plaintiff, in addition to the sum of seventy dollars per month hereinbefore mentioned, two and one-half ( $2\frac{1}{2}$ ) per cent. of the dividend declared for that year; said percentage to be paid on or before the 10th of February of the year succeeding that for which said dividend should be declared."

And it was further agreed, in and by the contract, "that said the Herzog Manufacturing Company reserved the right to terminate said agreement at any time upon one month's notice in writing given to the plaintiff, and that if said agreement should be so ter-

minated, or if the plaintiff should for any reason leave before the completion of any full year, he should receive no per cent. of the dividend for that year."

And the contract contained, among other things, the following provision, to wit: "And it is further agreed and understood by said parties to this agreement that, before any dividends shall be declared, all improvements, extensions, and additions to buildings or business, or for lease or purchase of land, to increase the facilities for said business for said party, for any year, which said second party may make to its plant or business, shall be deducted from the profits for that year, and said first party shall receive his percentage on the balance remaining after such deduction."

The principal question to be considered on this appeal is as to the construction of this contract in respect to plaintiff's claim to additional compensation based upon the profits made yearly by the corporation. That is to say, is the plaintiff, under the peculiar language of the contract, which speaks of a "percentage upon the dividend declared," entitled to receive a percentage upon the amount of the annual net profits not capitalized, or does his right to such share depend upon the fact of an actual division of such profits among the shareholders, and is the amount thereof limited by the amount of such division or dividend declared, whether all, or only a part, of the net profits which might be the proper subject of a dividend are divided? We are of the opinion that upon a fair construction of the instrument, taken as a whole, plaintiff's claim must be sustained, and that the first of the above propositions or questions should be answered in the affirmative.

It will be observed that the defendant agrees that for each year of the plaintiff's term of service, and in consideration thereof, it would pay him, in addition to the stipulated sum of \$70 per month two and a half ( $2\frac{1}{2}$ ) per cent. of the dividend declared for that year, to be paid on or before February 10th, following. Strictly, the terms "dividend declared" refer to an actual distribution of profits. But their application here must be considered in connection with the situation of the parties, and the nature of the case, as presented by the record, and especially in connection with the explanatory clauses in the concluding portion of the agreement, by which it

appears that plaintiff's percentage is to be based on the net profits for each year, after deducting expenditures for "improvements and extensions" for that year. This provision was intended to define and limit the agreement between these parties, and not to control the time or manner or question of the disposition of profits among the stockholders, since that is a matter with which the plaintiff had no concern, and which the corporation could regulate for itself, for, as to the stockholders, who are the beneficial owners of both profits and capital, the profits would still be theirs, whether divided, or left to form a surplus, or otherwise added to the capital. The percentage paid him by way of compensation must be treated as part of the expenses to be ascertained and excluded from the sum of the net profits which would be subject to be divided among the stockholders. The contract evidently contemplated that the plaintiff should receive a percentage of profits each year, depending upon the growth and prosperity of the business, and was intended to operate both as a stimulus and reward to the employee. It was an application of the principle of profit sharing between employer and employee, which depends upon the fact of the realization of profits, and not upon the mere contingency of the disposition which may be made of them, as between the corporation and its stockholders.

The plaintiff remained in the defendant's employment for the full term of three years, as stipulated in the agreement, and has been paid a percentage on two annual dividends.

As respects the third year, it does not appear from the record whether any dividend was made for that year. But it is alleged by the plaintiff, and admitted for the purposes of this case, that the dividends made did not include all the net profits for those years, and that there were large profits made from the business for each of the three years, in excess of expenditures for betterments, and on which he had received no percentage.

His receipt of a part of the percentage does not preclude him from recovering any balance due him. It was not paid or accepted in settlement of a disputed claim, or as an account stated. The acceptance thereof cannot be interpreted as a waiver or estoppel binding on him in respect to his claim for the balance. We think, there-

fore, that the appellant is entitled to an accounting in respect to the actual amount of net profits of the corporation for the years in question, and to recover any balance of his percentage which may thereupon be found due him.

Order reversed.

(Opinion published 57 N. W. Rep. 58.)

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LORING K. LOVEJOY *vs.* JEREMIAH J. HOWE *et al.*

Submitted on briefs Oct. 23, 1898. Affirmed Nov. 29, 1898.

No. 8846.

55	353
71	335

**Findings sustained by the evidence.**

Certain findings of fact *held* sustained by the evidence.

**Suit by creditor on the promise of a third person to the debtor to pay the debt.**

Where a debtor assigns his property to a purchaser, who, in consideration thereof, agrees to pay the claims of the creditors of the assignor, such creditors may sue the purchaser directly upon his agreement.

**Parol evidence of contents of instrument withheld by opponent.**

Where it appears with reasonable certainty that a written instrument was delivered to the assignee therein, who is a party to the action on trial, it is for him to account for or produce it upon due notice; and, if he does not, the opposite party may introduce parol evidence of its contents.

**Impressions of a witness as evidence.**

A witness will not be permitted to state his impressions unless he swears to the same as a matter of recollection, and not of inference or opinion.

**Findings, omission in, how treated.**

Where the trial court omits by manifest oversight to include in its findings a fact put in issue, but which was indisputably proven, and not contested or litigated on the trial, it may be assumed and treated as if found by the appellate court, in its discretion, without the formality of sending the case back for a further finding.

Appeal by Jeremiah J. Howe, one of the defendants, from a judgment of the District Court of Hennepin County, *Seagrave Smith*, v.55M.—23

J., entered January 30, 1893, against him and Sumner W. Farnham for \$2,820.51.

On May 25, 1886, at Fargo, Dak., James A. Chesley and Frank L. Lovejoy were partners in business, under the firm name of Chesley & Lovejoy, dealing in lumber. On that day they were indebted to Stephen B. Lovejoy \$1,625 and gave him their note therefor, due in ninety days with ten per cent. interest. The next day they dissolved partnership and Frank L. Lovejoy received a part of their assets and assumed payment of this note. He soon after conveyed and assigned to defendants, Jeremiah J. Howe and Sumner W. Farnham, the assets he received and they agreed with him to pay the note. They were partners in business under the firm name of J. J. Howe & Co. Stephen B. Lovejoy afterwards sold and delivered the note to the plaintiff, Loring K. Lovejoy, and he brought this action in April, 1892, to recover of defendants the amount due thereon. Farnham did not answer. Howe denied that his firm assumed to pay the note. The issues were tried November 15, 1892. A jury was waived and the Court made findings and ordered judgment for plaintiff. Defendant Howe moved for a new trial and to amend the findings. Both motions were denied. Judgment was entered and he appealed. The discussion here was upon the evidence, whether or not it supported the findings.

*Kitchel, Cohen & Shaw*, for appellant.

*Little & Nunn*, for respondent.

VANDEBURGH, J. The firm of Chesley & Lovejoy, in May, 1886, and for a long time previous thereto, were engaged in the lumber business at Fargo, Dak., and were then largely indebted, chiefly to Farnham & Lovejoy and J. J. Howe & Co., and at the date mentioned their assets were about equal to the amount of their debts, and they were then contemplating a dissolution of the partnership and a division of the assets, and the assumption by each member of the firm of his proper portion of the indebtedness, which included the note sued on in this action; and thereafter, on the 26th day of May, 1886, upon consultation with defendant J. J. Howe, one of the firm of J. J. Howe & Co., Chesley & Lovejoy entered into an agreement under which they agreed to dissolve their partnership, and Lovejoy, whose Christian name was Frank, was to receive the real

estate belonging to the partnership and the book accounts, and in consideration thereof to assume all the partnership indebtedness except a portion of the account due J. J. Howe & Co., which Chesley agreed to pay in consideration of a transfer to him of the balance of the personal property. The court finds that at or about the time of this agreement, and in connection with it, as a part of the same transaction, Frank Lovejoy transferred the book accounts to J. J. Howe & Co., and duly conveyed to J. J. Howe all the real estate received by him on the agreement of dissolution, being all the partnership assets to him transferred, and that J. J. Howe, in consideration thereof, promised and agreed to pay all the partnership indebtedness which Lovejoy had assumed as his portion of the liabilities of the firm. The other members of the firm of J. J. Howe & Co. were S. W. Farnham and James A. Lovejoy, the last two constituting the firm of Farnham & Lovejoy. But James A. Lovejoy had previously died, and J. J. Howe was one of his executors; and Howe, in looking after the assets of Chesley & Lovejoy, was interested not only for the firm of J. J. Howe & Co., but also for that of Farnham & Lovejoy. The note in suit is a part of the indebtedness in fact assumed by Frank Lovejoy; and the plaintiff, as the indorsee and present holder of this note, predicates this action upon the agreement of defendant Howe to assume and pay all the indebtedness of Chesley & Lovejoy which Lovejoy had assumed. It is well settled that a creditor who is within the class whose demands the purchaser of the assets of the debtor agrees to pay and satisfy may maintain an action upon such agreement. *Maxfield v. Schwartz*, 43 Minn. 221, (45 N. W. Rep. 429.)

One of the alleged errors, and that chiefly complained of, is that the evidence does not sustain the finding in plaintiff's favor that Howe agreed to pay the indebtedness in question. The evidence is conflicting, but we think there is sufficient in the record to support the finding. The deeds of the real property executed by Lovejoy ran to J. J. Howe, and bore the same date as the contract of dissolution between the parties, and were delivered to him. When the transaction was closed, he was not present, but was represented by an agent, who took charge of the book accounts, which were left by him with Chesley for J. J. Howe & Co.; and some of them, it appears were collected for that firm by Chesley, and the proceeds



received by it. It is insisted that the agent transcended his authority in the premises, but there is evidence in the case tending to show that it was in accordance with the agreement and understanding between Lovejoy and Howe. And, as respects the conflicting statements of Lovejoy and Howe, it may be suggested that it is hardly reasonable to suppose that Lovejoy would surrender to Howe or Howe & Co. all the property of the firm of Chesley & Lovejoy received by him without some satisfactory arrangement indemnifying him against the indebtedness assumed by him. We are of the opinion that the finding of the trial court upon the question under consideration must be affirmed.

The evidence seems to have left it uncertain whether the assignment of the book accounts was in writing; and at the trial, in response to the notice to produce the same, which notice the defendant tacitly admitted had been previously given, they denied that they had any such instrument in their possession, and hence failed to produce the same. The witness Chesley had already stated that it was his recollection that there was an assignment of the accounts by Frank L. Lovejoy in connection with the deeds of the lands, and thereafter he was permitted to testify over defendant's objection, though he could not state absolutely, that they were assigned to Howe. This is in corroboration of what other witnesses testified to. But it is objected here that it was incompetent, because the writing should have been produced. We think that upon the evidence it should be presumed under the circumstances that when the settlement was made and the agreement completed and executed, the assignment, if in writing, was delivered to J. J. Howe & Co. through their agent who represented them at the time, and, as Chesley did not receive the assignment after that time, and it was not delivered to him with the accounts, it must be presumed that the agent retained it for his principals, and that it passed into their custody, and it was for them to account for it; hence the ruling of the court complained of was not error.

Upon the cross-examination the witness Chesley had stated that he thought he "had an impression in respect to the nature of the transfer made to J. J. Howe, an impression that arose from what he heard at that time." The question was then asked by the defendant's counsel, "Will you state what your impression was?" which

question was ruled out by the court. We think the court did not err in this. A witness cannot be permitted to state what the impression left in his mind by a conversation is, unless he swears to such impression as matter of recollection, and not of inference. Whart. Ev. § 514; 1 Greenl. Ev. § 440.

The court does not find specifically that the note was indorsed to the plaintiff, and owned by him, but simply finds generally that the defendant is indebted to the plaintiff in the amount thereof. This was clearly an oversight by the court. The note, duly indorsed, was produced on the trial, and plaintiff's ownership was not questioned, nor the fact litigated at the trial, so that it may be assumed for the purposes of this appeal. *Menzel v. Tubbs*, 51 Minn. 364, (53 N. W. Rep. 656.)

The findings of fact are otherwise sufficient under the issues, and the court did not err in refusing in its discretion to find more specifically upon certain questions, as asked by defendants.

Judgment affirmed.

(Opinion published 57 N. W. Rep. 37.)

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55	357
85	144

**JAMES D. SHEEDY vs. CHICAGO, MILWAUKEE & ST. PAUL RY. CO.**

Argued Oct. 20, 1893. Affirmed Nov. 29, 1893.

No. 8408.

**Master's duty to servant to inspect and repair appliances.**

Plaintiff's intestate, an employé of defendant, was thrown off a moving car while endeavoring to set a brake thereon, and killed. The accident resulted from the loosening of the eyebolt which connected the brake staff with the chain which operated the brake. Held, that an examination of the brake staff and bolt, to discover whether the same were apparently in good order, was within the duty of the proper car inspector, while the car was en route, and that, upon the evidence in the case, it was fairly for the jury to determine whether this defect existed when the car passed the last inspection station, and whether it could have been discovered upon a reasonably careful inspection.

Appeal by defendant, the Chicago, Milwaukee and St. Paul Railway Company, from a judgment of the District Court of Mower

County, *John Whytock, J.*, entered May 24, 1893, against it for \$1,082.18.

On September 24, 1891, Charles Dunlap was employed as brakeman upon a freight train on defendant's road. While near Owatonna, going north, he attempted to set a brake on a refrigerator car. The eye bolt in the loop in lower end of the brake-staff broke, detaching the chain and allowing the hand wheel on the upper end of the brake-staff to whirl suddenly around. He was thereby thrown off between the cars, run over and killed. The plaintiff was appointed administrator of his estate and brought this action, under 1878 G. S. ch. 77, § 2, claiming death was caused by defendant's negligent omission to properly inspect the brake at Austin. Plaintiff had a verdict for \$1,000. Judgment was entered and defendant appeals.

*Kingsley & Shepherd*, for appellant.

The theory of the plaintiff is that the eye-bolt was defective, because the thread had not been cut with a cold chisel so as to hold the nut in position, and that prior to the accident the nut worked loose, which allowed the eye bolt to project from the brake staff, that this rendered it more liable to break and that it was the duty of the Railway Company in the exercise of ordinary care, through its car inspectors, to discover this defect and remedy it, and that because it failed to do this, it was negligent. Negligence is not to be presumed, but must be affirmatively proved by the party alleging it. In an action by a servant against his master to recover for injuries sustained by him while in the master's service, from defective appliances, the presumption is that the appliances were not defective, but if it is shown that they were defective, then the presumption is that the master had no notice of the defect and was not negligently ignorant of it. *Mynning v. Detroit, L. & N. R. Co.*, 59 Mich. 257; *Atchison, T. & S. F. R. Co. v. Wagner*, 33 Kans. 660; *Atchison, T. & S. F. R. Co. v. Ledbetter*, 34 Kans. 326; *Davidson v. Davidson*, 46 Minn. 117.

This was a foreign car just received, to be transferred over defendant's road. Defendant was not bound to examine into the construction of the car or any of its appliances. If there was no obvious defect, it had a right to assume that the car had been properly

constructed and to act on that presumption without applying to the car such tests as might have been proper in its original construction. It was not required to make a minute examination of this car in all its parts to discover defects not obvious upon an ordinary inspection. *Smith v. Chicago, M. & St. P. Ry. Co.*, 42 Wis. 520; *Ballou v. Chicago, M. & St. P. Ry. Co.*, 54 Wis. 257; *Sack v. Dolese*, 137 Ill. 129; *Painton v. Northern Cent. Ry. Co.*, 83 N. Y. 7; *Philadelphia & R. R. Co. v. Hughes*, 119 Pa. St. 301; *Fay v. Minneapolis & St. L. Ry. Co.*, 30 Minn. 231.

*French & Wright and John A. Lovely*, for respondent.

The defendant company was not bound as a common carrier to receive and draw the car in question, brought to it from another road, if unsafe and defective. By assuming to use it, defendant became responsible for its fitness for the use to which it was put. If the brake was defective and unsafe and this might have been ascertained by a reasonably careful inspection the defendant is liable. *Moon v. Northern Pac. R. Co.*, 46 Minn. 106; *Fay v. Minneapolis & St. L. R. Co.*, 30 Minn. 231; *Gottlieb v. New York, L. E. & W. R. Co.*, 100 N. Y. 462; *Mackin v. Boston & A. R. Co.*, 135 Mass. 201; *Fahy v. Rome, W. & O. R. Co.*, 59 Hun, 619.

VANDERBURGH, J. Plaintiff's intestate was employed as a brakeman by the defendant, and on the 24th day of September, 1891, was engaged in the discharge of his duty as such on a freight train running between Austin and Minneapolis, over its line of road, which left the former place about 3 o'clock in the morning. As the train approached Owatonna, thirty two miles north of Austin, it became necessary to stop at the crossing of the line of the Winona & St. Peter Railroad, about one mile south of the last-named place. The train was running down grade, and about twenty five or thirty miles an hour, and while the deceased was attempting to set the brake upon a refrigerator car, loaded with meat, in the train, the eye-bolt in the lower part of the brake shaft, which was connected with the chain which operates the brake shoes, suddenly broke, causing the accident complained of. The brake was constructed in the usual manner, with a perpendicular iron shaft extending above

and below the car, with a hand wheel at the top, by means of which the brakeman turns the shaft, and thus winds the chain about the lower part of the shaft, and brings the brake shoes to the car wheels, and slackens or stops their motion. It will thus appear that there is liable to be a great strain upon the eyebolt by the use of the brake, and if it suddenly breaks, so as to loosen the chain, while the brakeman is attempting to turn the hand wheel, the natural effect, as shown by the evidence, is to jerk or whirl him around with the wheel, and throw him off the car. In this case the deceased was in this manner thrown between the cars, and run over, and instantly killed. The eyebolt, which passes through the shaft, was fastened by a nut on the side opposite to the eye to which the chain is fastened; and, when the nut is screwed up close to the brake shaft, the eye is drawn close to the shaft upon the opposite side. Upon the evidence, the cause of the accident was the loosening of the nut, which had worked back to the end of the bolt, in consequence of which the bolt was pulled out of its proper position by the chain, so that there was about an inch between the eye and the staff, giving a greater purchase upon it when the brake was set, and causing it to break off between the eye and the staff. The liability of the defendant is predicated upon the assumption that the nut was loose and out of place at Austin, which is one of the points on defendant's road for the inspection of cars, and upon the negligence of the defendant in suffering the car to pass that place without properly inspecting it, and securely tightening the bolt.

There is no evidence in the case in relation to the inspection of the car at Austin. But, if the car was not out of order when it passed Austin, no repairs were then necessary, and no negligence could be imputed to the company for any neglect of duty at that place. But if, as the plaintiff contends, there is evidence warranting the inference by the jury that the nut had become loosened so that its defective or unsafe condition would be susceptible of observation, upon a reasonably careful inspection, when the car had arrived at Austin, then a presumption of negligence on the part of the company would be raised, which it would be necessary for it to overcome by proper evidence showing that due inspection was made, and the brake was found to be, or was put, in good order. The car did not belong to defendant, but was received from the Iowa

Central Railway Company at Mason City, 40 miles south of Austin, at which place cars were regularly inspected by both companies. It was the duty of defendant to inspect this car before undertaking to haul it over its own line, and it would be liable for defects discoverable upon reasonable inspection. The evidence in this case shows that, in order to be safe, the eyebolt must be held in its proper position by keeping the nut screwed close to the brake shaft. But the nut is liable to work loose when the car is in use, unless it is fitted closely, or the thread of the bolt outside of the nut is cut or flattened so as to prevent the nut from turning without the aid of a wrench. Hence, in view of the danger incident to the use of the brake upon freight cars, it is obvious that it is of great importance that the eyebolt should be carefully inspected at suitable intervals. Of course, all the inspection required is to see whether the bolt is securely fastened in its place, and this falls within the ordinary duties of an inspector of cars while en route.

It is conceded that the presumption, in the first instance, is, in actions of this kind, in the absence of any proof to the contrary, that the railroad company has performed its duty to its employees in the matter of inspection and repairs. It will therefore be assumed that the car in question was duly inspected at Mason City. All trains make three stops between this point and Austin, and two or three between Austin and Owatonna. But the car ran forty miles to Austin without accident, or any complaint in respect to the bolt. The evidence of one of the witnesses is that if the nut was properly tightened up, and in place, the car could run a long distance before it worked loose. The question will then naturally arise, how it happens, if it was properly inspected at Austin, that in an hour and a half, while traversing a distance of thirty miles, the nut should not only have become loosened from the staff, but should have worked out on the thread, to the end of the bolt, so as to allow the bolt to be pulled partly through the staff? This, we think, suggests the propriety of submitting the question to the jury. While we cannot say, with certainty, that, upon the undisputed evidence, the brake must have been out of order, or unsafe, when the car left Austin, yet we think it was fairly a question for the jury to determine, in view of all the circumstances, including the condition of this bolt and nut, which were before the jury.

But if it be a fact that a bolt fastened with a nut, only, as this was, without any device to keep it in place, is liable to become loosened between the ordinary intervals of inspection, it is obvious that inspection should have been more frequent, or the method described by the witnesses as commonly resorted to, of cutting or flattening the thread on the bolt next the nut, should have been adopted, as it appears to be simple, safe, and effective. In any view of the case, we think the question of the defendant's negligence was for the jury.

Judgment affirmed.

(Opinion published 57 N. W. Rep. 60.)

### BANK OF MONTREAL *vs.* PETER RICHTER *et al.*

Argued Oct. 25, 1893. Affirmed Nov. 29, 1893.

No. 8858.

#### Burden of proof in an action on a note obtained by fraud.

Where an answer to a complaint in an action upon a promissory note, brought by an indorsee, sets up fraud in the inception of the note, and such fraud is established by evidence on the trial, the burden of proof shifts, and the plaintiff is bound to prove that he took the same for value, and without notice of the fraud.

#### Verdict sustained by the evidence.

Evidence *add* sufficient to justify the jury in finding that the notes in suit were procured by the payees through fraudulent representations.

#### Evidence reviewed.

Plaintiff's evidence, offered to show that the notes were received by it in good faith, and without notice, *add* insufficient to make a case for the jury.

#### Erroneous instructions to jury held harmless.

Sundry instructions erroneous, per se, *add* without prejudice, in view of the state of the evidence in this case.

Appeal by plaintiff, Bank of Montreal, from an order of the District Court of Wadena County, *G. W. Holland, J.*, made April 8, 1893, denying its motion for a new trial.

On June 8, 1889, E. Bennett & Son of Topeka, Kansas, sold to the defendants, Peter Richter and nine others of Wadena, a stal-

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lion named Stoneclink for \$2,400 and took their promissory notes for the price, one for \$500 due in one year, one for \$900 due in two years, and one for \$1,000 due in three years, all bearing interest at eight per cent. a year. E. Bennett & Son indorsed and transferred the notes on June 29, 1889, at Chicago, Ill., to the Bank of Montreal as collateral security to their indebtedness to it. The notes fell due and remained unpaid. The Bank brought this action upon the note for \$1,000 against the ten makers thereof. The defendants answered that E. Bennett & Son on the sale knew the horse to be unsound and sick with an incurable disease, and fraudulently represented to them that he was sound, and well and all right. That defendants did not know or have notice that he was unsound or sick or not all right, and believed and relied upon the representations and were induced thereby to purchase and give the notes. That the horse was in fact worthless and afterwards died of the disease. They denied the other allegations of the complaint, but did not allege that plaintiff had knowledge or notice of the fraud when it obtained the note. Plaintiff replied, denying the representations and fraud and alleging that it had no notice or knowledge of any representations or fraud or of the consideration for the note when it obtained it. On the trial December 14, 1892, plaintiff read the note in evidence and rested. Defendants then offered evidence to prove the allegations of their answer. The plaintiff objected, but was overruled and it excepted and the evidence was received. Defendants gave no evidence of any notice to, or knowledge of the plaintiff of the fraud, at or before the transfer of the note to it. Plaintiff then asked the Court to instruct the jury to return a verdict for the plaintiff. This was refused and it excepted. Plaintiff then read in evidence depositions tending to show that it took the note in the due course of business without notice of the fraud or of the consideration for the note, but the evidence was not full or complete. The jury returned a verdict for defendants. Plaintiff moved for a new trial, but was denied and it appeals.

*A. G. Broker, for appellant.*

The answer did not contain a defence. It failed to allege that plaintiff had no notice or knowledge of the fraud at or before the



time it took the note June 29, 1889. *Cummings v. Thompson*, 13 Minn. 246; *Merchants' Exch. Bank v. Luckow*, 37 Minn. 542; *McLaren v. Cochran*, 44 Minn. 255; *Davis v. Bartlett*, 12 Ohio St. 534.

Plaintiff became the owner of the note long before maturity, has been the owner of it ever since and gave a good and valuable consideration for it and took it without notice. This entitled it to a verdict. *Rosemond v. Graham*, 54 Minn. 323.

*Coppernoll & Willson*, for respondents.

Defendants were not required to allege in their answer that plaintiff had notice of the fraud in the inception of the note in order to be allowed to prove the fraud, and cast the burden upon plaintiff to show itself a *bona fide* holder for value, before maturity, without notice. *First National Bank v. Ruhl*, 122 Ind. 279; *Kain v. Bare*, 4 Ind. App. 440; *Bunting v. Mick*, 5 Ind. App. 289; *Haggland v. Stuart*, 29 Neb. 69.

If it were a fact that plaintiff's witnesses, Ambrose and Bennett, had testified in their depositions that the note sued upon was transferred before maturity for a valuable consideration, without notice, and in due course of business, and had given all the facts and circumstances showing such transfer, want of notice and consideration, yet the question would have remained one of fact for the jury. *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549; *Kavanagh v. Wilson*, 70 N. Y. 177; *Gildersleeve v. Landon*, 73 N. Y. 609; *Brooklyn C. R. Co. v. Strong*, 75 N. Y. 591; *Honegger v. Wettstein*, 94 N. Y. 252; *Twombly v. Munroe*, 136 Mass. 464.

If the defendants are entitled to a verdict for the reason that plaintiff has not shown itself to be a *bona fide* holder of the note, any error in law committed by the Court as to any other matter or proposition, is immaterial and hence not prejudicial. *Coit v. Waples*, 1 Minn. 134; *State v. Staley*, 14 Minn. 105; *Lind v. Pickett*, 7 Minn. 184; *Cole v. Maxfield*, 13 Minn. 235; *Whitaker v. Culver*, 9 Minn. 295; *Kraemer v. Duesterman*, 40 Minn. 469.

VANDERBURGH, J The promissory note sued on was given for the purchase price of a stallion, and the defendants, in their answer, in addition to denials, set up as a defense that they were

induced to make the purchase and to execute the note by the false and fraudulent representations of the agent of the payees, who were the owners of the horse. On the trial the plaintiff objected to the admission of any evidence under the answer, on the ground that, in addition to the charge of fraud, it did not allege that the plaintiff had notice thereof when it took the note. We think it is the usual practice to insert such allegations in the answer in such cases, but in this case the defect, if any, is cured by the reply, which shows, in substance, that plaintiff's information on the subject was obtained after it acquired the note. In no event could the plaintiff be prejudiced by the ruling of the court.

Upon proof by the defendants of the fraud as alleged, the plaintiff was required to assume the burden of proving that it took the note for value, and without notice of the fraud. Under the code system, it is held, in some of the states,—and, as I think, properly,—that the plea of fraud is a good defense by itself, and it is not necessary for the defendant, in addition thereto, to allege in his answer, in such cases, that plaintiff had notice of the fraud in the inception of the note. See *First Nat. Bank v. Ituhl*, 122 Ind. 279, (23 N. E. Rep. 766.) And this rests upon the ground that the existence of the fraud raises the presumption that the plaintiff's title is not *bona fide*, and the burden, in consequence, shifts, and it is incumbent on the holder of the note to show that he took it in good faith, with all that these terms imply. *Vosburgh v. Diefendorf*, 119 N. Y. 365, (23 N. E. Rep. 801;) *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 206, (25 N. E. Rep. 402.) He must show under what circumstances, and for what value, he became the holder. *Seymour v. McKinstry*, 106 N. Y. 240, (12 N. E. Rep. 348, 14 N. E. Rep. 94;) *Totten v. Bucy*, 57 Md. 453. The reason for this rule, generally assigned, is that where there is fraud the presumption is that he who is guilty of it will part with the note thereby acquired for the purpose of enabling some third party to recover on it. Such presumption operates against the holder, and suspicion follows the note into his hands, and fastens upon his title. *Cummings v. Thompson*, 18 Minn. 252, (Gil. 228.)

The defendants' evidence was sufficient to make out a case of actionable fraud, and fully justified the verdict of the jury in

their behalf, unless it was made to appear by the plaintiff that it took the note without notice of the fraud. This the plaintiff undertook to show. It does not claim to have discounted the notes, but that it took them, with other notes, as collateral security for an indebtedness due the bank from the payees. The bank was to collect the same at the expense of the payees, and credit them, in their account, with the net proceeds. Though this may be sufficient, under the decision in *Rosemond v. Graham*, 54 Minn. 323, (56 N. W. Rep. 38,) to make the plaintiff a holder for value, nevertheless, on the question of good faith, there is not enough in the nature of the transfer to sustain plaintiff's case. It is quite different from a case where, in the ordinary course of business, the holder has purchased negotiable paper, underdue, for its face value or nearly so, which of itself would, if free from suspicious circumstances, be entitled to much weight upon the issue of good faith. Undoubtedly, the plaintiff, in this case, was obliged to show want of notice of the fraud, by competent testimony, in addition to the fact that it holds the notes as collateral security. The plaintiff was bound to show that the defense of fraud was inoperative as against it, and this we think the depositions introduced for that purpose failed to do. That of one of the payees disclosed nothing upon the subject, and it does not appear that the witness Ambrose, who was the only other witness in plaintiff's behalf, was in a position to know what notice or knowledge the plaintiff may have had in respect to the transactions upon which the charge of fraud is based. His evidence does not show that he was the officer or agent of the bank through whom the transfer of the notes was made, and who acted, or was qualified to speak, for the bank in the matter. If, however, the transaction had been with him solely in behalf of the bank, and he had testified to the circumstances under which the transfer was made, his evidence tending to prove the *bona fides* of the transaction would have made a *prima facie* case, within the rule in *Rosemond v. Graham*, *supra*, without the necessity of calling other officers or agents of the bank. But the other witness—one of the payees above referred to—testifies that the person through whom the notes were delivered to the bank was one Monroe, the manager, and the

testimony of Ambrose is not in conflict with this. The latter says that the books of the bank show that the notes were transferred to it in June, 1889; that he had been employed by the plaintiff, in different capacities, for ten years; and, generally, that the bank took the notes as collateral security for cash advanced; and says, "We understood that the notes were taken by the payees in the usual course of business, and the bank knew of no other agreement in relation to the giving of the notes, other than expressed by the notes themselves." This is all the evidence bearing on the question. It does not appear what his means of knowledge were, or the extent of it, or that he could speak from personal knowledge, or that he was the only person connected with the bank who had knowledge on the subject, nor were his answers full, explicit, or satisfactory. The evidence fell short of what was required to make a case for the jury on the issue of good faith or notice, and the defendants were entitled to a verdict, if the issue of fraud was found in their favor. It follows that many of the alleged errors of the court, in its rulings and charge, were without prejudice, and do not, therefore, require special mention.

The instructions were subject to criticism on the ground that they were palpably conflicting and contradictory, but upon the material issues, as finally passed upon by the jury, no prejudice could have resulted to the plaintiff.

Order affirmed.

(Opinion published 57 N. W. Rep. 61.)

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BANK OF MONTREAL *vs.* PETER RICHTER *et al.*

Argued Oct. 25, 1893. Affirmed Nov. 29, 1893.

No. 8855.

Appeal by plaintiff, Bank of Montreal, from an order of the District Court of Wadena County, *G. W. Holland, J.*, made April 9, 1893, denying its motion for a new trial.

This action was brought against Peter Richter and nine others upon the two promissory notes, one for \$500, and the other for \$900 mentioned in the statement of the case in the foregoing action (*ante*, p. 862). The parties

to this action were the same as in that. It was tried December 12, 1892. The pleadings, evidence and proceedings were, so far as legal questions were involved, similar to those in the preceding case. Defendants had a verdict. Plaintiff moved for a new trial, but was denied and it appeals.

*A. G. Broker*, for appellant.

*Coppernoll & Wilson*, for respondents.

PER CURIAM. The same questions are presented, and the same conclusions reached, as in the above case, *ante*, p. 862 (57 N. W. Rep. 61.)

Order affirmed.

(Opinion published 57 N. W. Rep. 62.)

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DAVIS & RANKIN BUILDING & MANUF'G Co. *vs.* A. H. C. KNOKE *et al.*

Argued Oct. 17, 1893. Reversed Nov. 29, 1893.

No. 8890.

**Contract Construed.**

This case held distinguishable from *Gibbons v. Ben's*, 51 Minn. 499, by reason of certain provisions inserted in the contract, by which the defendants assume a joint liability or obligation for the payment of the contract price for the erection and equipment of a certain creamery, constructed by the plaintiff's assignors.

Appeal by plaintiff, Davis & Rankin Building and Manufacturing Company, from an order of the District Court of Otter Tail County, *L. L. Baxter, J.*, made January 31, 1893, denying its motion for a new trial.

Daniel J. Davis and Thomas Rankin were partners in business at Chicago, Ill., under the firm name of Davis & Rankin. As such partners they made a contract December 10, 1890, with defendants, A. H. C. Knoke and sixty others, farmers at and near Parker's Prairie in Otter Tail County, to build and equip for them a creamery at that place, for which they were to receive \$5,000. Each of the subscribing farmers set opposite his name the amount he was to pay into the enterprise. They agreed to form a corporation and each farmer was to have stock to the amount of his subscription. The creamery was built and equipped and Davis & Rankin were paid \$4,226 upon the price. Some of the farmers failed to pay their subscriptions and the others refused to pay more

than they subscribed and so \$774 remained unpaid. On June 10, 1891, Davis & Rankin filed a mechanic's lien upon the creamery. They became incorporated under the laws of Illinois and assigned their claim to the corporation and it brought this action to foreclose the lien, making all the subscribers defendants. Those farmers who had paid as they agreed answered, claiming that their interest in the creamery should not be subjected to the payment of the subscriptions of their delinquent neighbors, and that by the terms of the contract with Davis & Rankin they were not individually liable or their interest in the creamery subject to the lien. The issues were tried November 26, 1892. After argument the trial Court construed the contract to be the several contract of each of the farmers for his subscription, and that they were not jointly liable for the whole sum and dismissed the action on the merits as to the answering defendants. Plaintiff moved for a new trial, but was denied and it appeals.

*Mason & Hilton and J. D. Van Dyke, for appellant.*

The decision of this case turns upon the construction of the contract. If the obligation of the defendants is a joint one, then the Court below erred in its order dismissing the action as to the defendants who had paid their subscriptions. The learned Court below deemed the decision in *Gibbons v. Bente*, 51 Minn. 499, decisive of the case at bar. But plaintiff contends that the contract in the case at bar is radically different from the contract construed in *Gibbons v. Bente*, *supra*. Our contract provides that in the articles of incorporation and in the by-laws provision shall be made that the private property of stockholders shall not be liable for corporate indebtedness, except that which is hereby created and to be paid to the party of the first part. This provision is not contained in the contract construed in *Gibbons v. Bente*. Our contract provides that the \$5,000 is payable as follows; twenty five per cent. to be paid in cash when the creamery is completed, forty per cent. by good approved joint note payable in three months, thirty five per cent. by good approved joint note payable in six months, said notes to draw six per cent. interest. These provisions are not contained in the contract construed in *Gibbons v. Bente*. *Smith v. Gill*, 37 Minn. 455.

*Jenkins & Treat*, for respondents.

The plaintiff relies solely upon the two paragraphs of the contract, pointed out in its brief, to support its contention that the contract creates a joint liability of defendants. The first provision appears in the contract construed in the case of *Davis v. Belford*, 70 Mich. 120, which contract the Michigan Court held in that case to create a several liability on the part of the subscribers.

The contract in the case at bar contains substantially the same provisions that are found in the contracts construed in *Davis & Rankin B. & M. Co. v. Barber*, 51 Fed. Rep. 148; *Gibbons v. Grinsel*, 79 Wis. 365; *Frost v. Williams*, (S. D.) 50 N. W. Rep. 964. Each subscriber placed his name to the contract for a definite sum of money, and it is unreasonable to presume that he intended to make himself liable to the other party for the whole contract price, or that the other party so understood it.

To construe the other paragraph in question as binding all the subscribers to join in the execution of notes for the deferred payments, in such form as to make each subscriber liable for the whole amount unpaid, would be repugnant to and inconsistent with the manifest intention of the parties, as shown by the other parts of the contract, and such construction should not be adopted unless the language makes it unavoidable. *Price v. Grand Rapids, &c., R. Co.*, 18 Ind. 137; *Landwerlen v. Wheeler*, 106 Ind. 523.

VANDERBURGH, J. This case would be controlled by the decision in *Gibbons v. Bente*, 51 Minn. 499, (53 N. W. Rep. 756,) but for the fact of the insertion of certain provisions in the contract here involved which are not found in the one under consideration in the case referred to.

In the contract in this case the defendants, in the first place, agreed to pay the sums severally set opposite their names in consideration of the erection and completion of a certain creamery, described in the complaint, by the plaintiff's assignors.

The contract provides for the organization of a corporation in which each subscriber should be entitled to receive stock to the amount paid by him under the contract.

The assignors of the plaintiff by the contract "agree to erect said creamery according to the within plans and specifications for the

sum of \$5,000, payable in cash, or as hereafter specified in said contract." And the contract also contains the further provisions, first above referred to, viz.: "The above-mentioned \$5,000 is to be paid as follows: twenty five per cent. to be paid in cash when said creamery is completed and the above-mentioned machinery placed therein, all in good running order; forty per cent. to be settled by good, approved joint note, payable in three months from the date of completion of said creamery; thirty five per cent. to be settled by good, approved joint notes, payable in six months from date of completion of said creamery." This obligation binds all the subscribers, including these defendants. They jointly assume the payment of the consideration. They agree to pay twenty five per cent. in cash of the whole consideration of \$5,000, and to provide for the balance by approved joint notes. As between the plaintiff and parties of the second part, the contract does not contemplate that the liability should be apportioned.

It follows that the plaintiff is entitled to enforce its lien upon the entire property in question, and not merely upon the separate interests of such of the subscribers as have not paid.

The order appealed from will accordingly be reversed, and the case remanded, with directions to render judgment for the plaintiffs as prayed for in the complaint.

(Opinion published 57 N. W. Rep. 62.)

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MINNEAPOLIS MILL Co. *et al.* vs. MINNEAPOLIS & ST. LOUIS RY.  
Co. *et al.*

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Submitted on briefs Nov. 1, 1893. Affirmed Nov. 29, 1893.

No. 8341.

**Findings sustained by the evidence.**

The evidence in this case *held* to sustain the findings of fact of the court below, and the order denying the motion for a new trial is affirmed.

Appeal by the defendants, the Minneapolis & St. Louis Railway Company, W. H. Truesdale receiver of its property, and the Rail-



road Transfer Company of Minneapolis, from an order of the District Court of Hennepin County, *William Lochren, J.*, made January 31, 1893, denying their motion for a new trial.

The plaintiff, the Minneapolis Mill Company, is a corporation created by an act of the Legislature of Minnesota Territory, Laws 1856, ch. 145, and owned the water power and mill sites on the western bank of the Mississippi at the Falls of St. Anthony. The plaintiff, the Minneapolis Western Railway Company, is a corporation organized in 1884 under 1878 G. S. ch. 34, Title 1. On March 25, 1873, the Mill Company sold and conveyed a mill site to W. D. Washburn for Palisade Mills, and the right in common with the Mill Company, its successors, grantees, and lessees, to build and use a railway track from South Street over its land to and in front of the millsite property sold him and 150 feet beyond. That year such railway track was built and has ever since been maintained and used by the Minneapolis and St. Louis Railway Company by arrangement with and under the request of Washburn. The Mill Company on January 28, 1892, granted to the Minneapolis Western Railway Company the right to use and operate cars upon this railway track in common with Washburn and his grantees. It and the Mill Company notified the defendants of this grant and of their desire to operate cars thereon in common with the defendants and offered to pay them one half the cost of the track and such charges and expenses in the matter as would be just, but the defendants refused to allow the Minneapolis Western Railway Company or the Mill Company to use the railway track in any manner whatever, and prevented them from using or enjoying it. The Mill Company and the Western Railway Company brought this action to obtain a decree enjoining the defendants from interfering with and preventing them from using this railway track in common with Washburn's grantees and to determine the rights of the parties.

The Minneapolis and St. Louis Railway Company, W. H. Truesdale as receiver, and the Minneapolis Transfer Railway Company answered that the Minneapolis and St. Louis Railway Company alone built this railway in 1873 from South Street to Palisade Mills and 150 feet beyond and has ever since used and operated it and is the exclusive owner thereof and of the ground on which it is located. They denied that it so built the track under said license or grant:

from the Mill Company to Washburn. They alleged that it built the railway at the request of the Mill Company to enhance the value of its property and that the Mill Company gave it the easement and right of way it had ever since enjoyed. The issues were tried November 21, and findings were filed November 23, 1892, six days after the decision in *Minneapolis Mill Co. v. Minneapolis & St. Louis Ry. Co.*, 51 Minn. 304. As conclusions of law the trial Court found that plaintiffs were entitled to the relief they demanded and ordered judgment accordingly. Defendants moved for a new trial, but were denied, and they appealed. The discussion in this Court was upon the evidence, whether it supported the findings.

*A. E. Clark and W. F. Booth*, for appellants.

*W. B. Koon and W. E. Dodge*, for respondents.

BUCK, J. We have not been able to discover any substantial merit in this appeal.

The undisputed facts are that the track in controversy is on the mill company's land; that it occupies the exact location described in a deed from the mill company to Washburn, by which the former granted to Washburn, his heirs and assigns, the right, in common with the mill company, its successors, grantees, lessees, or assigns, to locate, build, and use a railway track; that this is the only authority the mill company ever gave to build a track over these lands, and that this is the only track built thereon; that subsequent to the execution of this deed the defendant railway company, and a copartnership company, of which Washburn was a member, or, as defendant claims, the defendant railway company alone, (it is immaterial which,) built the track under authority from, or some arrangement with, Washburn.

It is not material what were the terms of the arrangement between Washburn and the defendant lessee; for, the defendant railway's only right to build it having been derived from Washburn, it could acquire no other or greater right than he had, and its right is subject to all the limitations and conditions to which his right was subject, according to the terms of the deed from the mill company.

Neither is it important that the mill company may not have contributed its share of the expense of building the track. That

might be a ground for requiring that, as a condition to the exercise of the right of common use of the track, it should thus contribute, but no such relief is asked for. Neither does the fact that for years the defendant railway company has been permitted to have the exclusive use of the track affect the legal right of the mill company, or its grantee, to assert its rights. There is no foundation in the evidence for any claim that the defendant railway company has acquired title to the track by adverse possession, for its possession does not appear to have been adverse to the mill company. It also appears that the Western Railway Company is the grantee of the mill company. Not only does the evidence justify the findings of the trial court, but it was such that no other findings would have been sustained.

The order denying the motion for a new trial is affirmed.

(Opinion published 57 N. W. Rep. 64.)

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MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY CO. *vs.* JOHN  
CHISHOLM *et al.*

Submitted on briefs Oct. 19, 1898. Modified Nov. 29, 1898.

No. 8359.

**Evidence held to show vendee entered with vendor's consent.**

Where a contract for the sale of land required payment of the purchase price, before entry and the erection of improvements thereon by the vendee, but the vendee nevertheless entered and constructed improvements thereon, with the knowledge of the vendor, and thereafter continued to occupy and use the same without objection, *held*, that the court was justified in finding, under the circumstances of the case, that such entry was with the consent and acquiescence of the vendor, and that the condition of the contract in respect to payment before entry was waived, and also that such vendee was in possession under the contract.

**Lapse of time as against a vendee in possession.**

*Held*, also, that while such possession continued, and no steps were taken to cancel or enforce the contract, the remedial rights of the vendee were not prejudiced by mere lapse of time.

**Fraud, to avoid a written contract, should be clear and persuasive.**

To avoid an instrument for fraud in its execution, the evidence must be clear and persuasive, and the party assailing it must himself be reasonably free from fault and negligence.

**Evidence insufficient to establish fraud.**

Evidence of fraud *held* insufficient to warrant the court in setting aside the contract in question here.

**Tender before suit for specific performance. Costs.**

In an action for specific performance by the vendee, tender of performance on his part before suit brought is not essential. It is enough that he be ready and willing to perform, and that he make the proper tender of performance in his complaint. The rights of the parties may be adjusted in the decree; but, unless such tender has been made before suit, it is error to award costs to the plaintiff.

Appeal by defendants, John Chisholm and Mary his wife, from an order of the District Court of Stearns County, *D. B. Searle, J.*, made February 2, 1893, denying their motion for a new trial.

On April 27, 1886, the defendants entered into a contract with the Minneapolis and Pacific Railway Company to convey to it, its successors or assigns, on demand within three years thereafter, a strip of land one hundred feet in width for its railroad over the southeast quarter of the southeast quarter of Section eight (8), T. 122, R. 32, near Paynesville in Stearns County. The contract contained the condition that if the railroad was not actually constructed across the land within three years thereafter, it should be void. It further provided that the Railway Company might enter upon the land to survey and locate its railroad, but should not commence actual construction until it had paid or tendered \$30 per acre, which was the agreed price to be paid for the land taken. Upon payment or tender of the amount within three years from that date, the Railway Company, its successors or assigns, was to have a deed of the strip free and clear of all liens. The Company took possession of the strip of land in 1886 and built its railroad over it that year without objection, occupying three acres.

On June 11, 1888, the plaintiff, the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, succeeded to the rights, property and franchise of the Minneapolis and Pacific Railway Company by an instrument of consolidation dated that day and has ever since operated the railroad and had possession of the right of way. On

September 3, 1891, it brought this action for specific performance of the contract, brought the \$90 and interest into Court and asked that defendants be compelled to convey to it this strip of land occupied by it for right of way.

The defendants answered, that they did not when they made the contract have a clear title to the land and agreed with the Minneapolis and Pacific Railway Company to release to it their claim only to the strip of land, for \$30 per acre. That its agent then prepared and pretended to read to them the material parts of a contract to that effect and they supposed that they signed it, but that he fraudulently substituted another, in the terms stated in the complaint. That neither company ever offered or tendered to them the money or demanded a deed, prior to bringing this suit, that the plaintiff company took possession of the strip of land in October, 1888, without the license or consent of defendants, and that defendant, John Chisholm, has since acquired a good and perfect title in fee simple to the entire forty acres described in the contract.

The issues were tried January 4, 1892, and the Court made findings, and directed judgment that plaintiff pay into Court for defendants \$131.14, being \$30 per acre and interest from the date of the contract and that the plaintiff should thereupon be invested with title, and directed defendants to execute and deposit in Court for plaintiff a conveyance of the land as contemplated in the contract, and awarding to plaintiff costs and disbursements. Defendants moved for a new trial, and being denied appeal.

*Oscar Taylor*, for appellants.

*Alfred H. Bright and George H. Reynolds*, for respondent.

VANDEBURGH, J. The Minneapolis & Pacific Railroad Company, to whose rights and property the plaintiff has succeeded, procured of the defendants a contract for the conveyance to it, its successors or assigns, of a strip of land for right of way through their farm. The contract was executed and dated April 27, 1886, and contains a covenant on defendants' part to convey the land described therein and in the complaint, upon demand and payment of the price stipulated at any time within three years. It also provided that the construction of the road across the defendants' land should not

be commenced until defendants should have been paid or tendered the price agreed on, but "that, upon payment or tender of that amount, within three years from the date of the contract, the second party, its successors or assigns, shall be entitled to a deed free and clear of all liens." This action for a specific performance of the contract was brought in 1891. The plaintiff, among other things, alleges that its road was located and constructed in the year 1886, upon the strip of land here in question, with the consent and acquiescence of the defendants, and it has since so continued in the exclusive occupation and possession thereof.

It further alleges that it is ready and willing to pay the purchase money, and that it brings the same into court for such purpose.

Under the allegations in the answer, the defendants undertook to show that there was fraud in the execution of the contract in this: That it was agreed and understood between the parties that the deed to be given should be a quitclaim only, and the contract was not so written. The trial court held that the evidence was not sufficiently clear and satisfactory to establish fraud in the execution of the contract. In this we think the court did not err, since the rule in such cases is that the party seeking to avoid the contract should himself be reasonably free from negligence, and the evidence should be clear and persuasive. 2 Whart. Ev. § 932; *McCall v. Bushnell*, 41 Minn. 37, (42 N. W. Rep. 545,) and cases.

Here nearly six years had passed before the trial. The recollection of the defendants was evidently not very distinct, except they felt sure that it was a quitclaim they were to give, and that the agent who procured it so read the contract. They did not read it themselves, nor require it to be read in full, nor ask for a copy, though they had ample opportunity to read it if they chose. The contract calls for a conveyance, but not for a quitclaim or a deed with covenants; and the defendants allege that they had perfected the title within the previous five years. A careful examination of the evidence of the defendants, including the cross-examination, satisfies us that the court was right, and that the evidence was insufficient to avoid the instrument.

The court finds, in conformity with the allegations of the complaint, that the company was suffered to take possession of the land in controversy, with the knowledge, consent, and acquiescence

of the defendants, and has ever since remained in the full, open, exclusive, and uninterrupted possession of said strip of land, and has constantly used and occupied the same, in the operation and maintenance of a railway thereon. It does not appear that the defendants ever made any objection to the construction and operation of the road, though they knew all about it, and this is sufficient to sustain the finding of the court, and to show a waiver of the technical terms of the contract, requiring payment as a condition precedent to such occupation, and the case does not differ substantially from other cases, which not infrequently arise, where a vendee takes possession with the implied consent of the vendor, though that right is not given by the contract.

In respect to the plaintiff's delay, the conduct of the parties in such cases will be considered in determining the question whether it should be excused; and on this question the plaintiff's possession and defendants' acquiescence therein become material, as tending to show that the contract is not forfeited, but is still subsisting. While plaintiff was in the undisputed possession, and no steps taken by either party, there was a mutual recognition of the continued existence of the *status quo* under the contract. *Gill v. Bradley*, 21 Minn. 21.

As respects the performance of the contract, the forbearance was mutual, (*Waters v. Travis*, 9 Johns. 458;) and the lapse of time did not prejudice plaintiff's remedial right. (Pom. Cont. § 409.)

Under a proper construction of the contract, the covenants to pay and to convey were dependent, and, time not being made essential, and the delay having indeed been waived, there is no substantial reason why the contract should not be enforced.

The evidence is ample and indisputable that plaintiff has succeeded to the title and rights of the Minneapolis & Pacific Railroad Company, and we think the allegations of the complaint in that behalf sufficient. No question was raised on this appeal in respect to interest due defendants, under the contract, after the plaintiff's entry on the land, but that may be adjusted in the court below without the necessity of a new trial.

There is but one other question in the case which we deem necessary to consider. In the equitable action to enforce specific performance, it is no defense to the merits that a tender of perform-

ance is not made before suit brought. It is sufficient that the plaintiff offer to perform in his complaint, and the rights of the parties, including the question of costs and interests, may be adjusted in the decree. The failure to make the tender before suit can only affect the question of costs. *Lewis v. Prendergast*, 39 Minn. 302, (39 N. W. Rep. 802;) *Freeson v. Bissell*, 63 N. Y. 171.

The court erred in finding that the plaintiff is entitled to costs and disbursements, and in directing judgment in its favor therefor. As before intimated, this should have been equitably adjusted between the parties in the judgment, as well as the matter of the payment of the purchase money and interest; but as a new trial is not necessary for the correction of this error, the order denying it will be affirmed, but the case will be remanded, with directions to modify the order for judgment in accordance with the suggestions in this opinion.

(Opinion published 57 N. W. Rep. 68.)

Application for reargument denied December 13, 1893.

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MARY C. LANE vs. JOHN W. HOLMES.

Submitted on briefs Nov. 2, 1893. Modified Nov. 29, 1893.

No. 8540.

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**Equitable relief from the consequence of a mistake of law.**

While it is a general rule that for a mistake of law, pure and simple, there is no remedy or relief, yet where the surrounding circumstances are of such a nature that the adverse party in seeking to avail himself of the opportunities afforded by the mistake, and attempting to enforce an unconscionable advantage without consideration, and the other party is not blamable, equitable relief can in such case be afforded to the party so mistaken if the other party is not thereby injured, and such mistake need not be mutual.

**Mistake of both law and fact.**

Where there is a mistake of fact, or a mistake of law and fact combined, equitable relief can be granted, especially if such relief does not result in injury to the opposite party.



**Mistake on a foreclosure sale relieved by resale.**

Where, by reason of a mistake in the computation of interest on a note secured by a mortgage, there is claimed to be due in the notice of foreclosure sale a larger sum than is legally due, and the premises are bid in by the mortgagee for the sum so claimed, but in good faith, believing that he is only bidding for the sum actually due, and the mortgagor is attempting to recover by action against the mortgagee, as surplus, the excessive interest so computed and included in the sum bid, and the premises are of less value than the sum actually and legally due, the mortgagee may be afforded equitable relief, and a resale ordered.

**Mortgagee in possession.**

In such case the value of the use of the mortgaged premises after the first foreclosure and the expiration of the time for redemption by the mortgagee in actual possession with the actual or implied assent of the mortgagor, need not be tendered to the mortgagor before such resale, for, being a mortgagee so in possession after the conditions broken, he is rightfully there, and the mortgagor could not recover possession without satisfying the mortgage.

Appeal by plaintiff, Mary O. Lane, from an order of the District Court of Clay County, *D. B. Searles, J.*, made July 19, 1893, denying her motion for a new trial.

*W. B. Douglass*, for appellant.

The mistake which defendant seeks to correct by his answer, praying for equitable relief, was an error of law and was not mutual to the parties. When neither party is to blame and damage results to one, relief cannot be granted to the other. *Catlin v. Fletcher*, 9 Minn. 85; *Hunt v. Rousmaniere's Estate*, 1 Pet. 1; *Galtra v. Sanasack*, 53 Ill. 456; *Shroll v. Klinker*, 15 Ohio, 155; *Thompson v. Thompson*, 18 Ohio St. 73.

*John E. Greene*, for respondent.

The foreclosure of the mortgage and bidding in of the premises for the excessive sum of \$4,222.34 is shown to have been done through the inadvertence and excusable neglect of the defendant's attorney in the foreclosure proceedings, in not examining the mortgage as well as the note to ascertain whether the debt bore inter-

est. A proper case is shown for equitable relief on that ground. *Barthell v. Roderick*, 34 Ia. 517; *Snyder v. Ives*, 42 Ia. 157.

Upon an examination of *Bidwell v. Whitney*, 4 Minn. 76; *Dickerson v. Hayes*, 26 Minn. 100; and *Bennett v. Healey*, 6 Minn. 240, we are strongly impressed with the idea that an estoppel was established. No objection was made to the amount claimed in the notice of sale until long after the sale had ripened into a title.

BUCK, J. The plaintiff and her husband executed to the defendant a promissory note as follows:

"\$3,000. Moorhead, July 10, 1885. Five years after date I promise to pay to the order of John W. Holmes three thousand dollars, at Fulton Bank, New York, value received, with interest before and after maturity at the rate of —— per cent. per annum until paid. Alpheus F. Lane. Mary Cole Lane."

At the same time they executed a mortgage on the northeast quarter of section thirty two (32) T. 139 R. 48, in Clay county, to secure the payment of said note, which mortgage contains this clause: "Provided, nevertheless, that if said Mary Cole Lane and Alpheus F. Lane, parties of the first part, their heirs, shall well and truly pay or cause to be paid to the party of the second part, his heirs, the sum of three thousand dollars and interest, according to the conditions of one promissory note in the amount of \$3,000, made, executed, and delivered by said Mary Cole Lane and Alpheus F. Lane to said John W. Holmes, due five years after date, which said note is without interest, bearing even date herewith."

There being default in the payment of the note, or any part thereof, the defendant, residing in the state of New York, sent the note and mortgage to an attorney of Moorhead, Minn., with instructions to foreclose the mortgage, but without instructions as to the amount due. The attorney foreclosed the mortgage, and in the notice of such foreclosure proceedings it was claimed that there was due upon said note and mortgage the sum of \$4,102, which amount was arrived at by computing interest upon the note at the rate of seven per cent. per annum from the date thereof to the date of the notice of foreclosure sale; and the said premises were bid off, December 15, 1890, for that sum, with expense of foreclosure added, amounting to \$4,222.34. The premises were bid in by the

defendant's attorney for and in the name of defendant in good faith, and without any design on the part of the defendant or his said attorney to defraud or injure plaintiff, or prejudice her interests or rights in the premises, as the said premises at the time of such foreclosure sale were not of greater value than \$2,500, and never were, at any time between the time of such sale and the time of the commencement of this action, of greater value than \$3,000. The defendant did not know until after such foreclosure sale that such interest had been included in the amount for which said premises were so bid in for him by his attorney, as it was the purpose and intent of the defendant by such foreclosure to extinguish the indebtedness of the plaintiff and her husband to him under said note and mortgage; and that the only instructions he gave to his said attorney in the foreclosure proceedings were that the premises should be bid in for the defendant for the full amount due, regardless of the value of the mortgaged premises, it not being the intention of the defendant at the time of the execution of the mortgage to charge interest upon the indebtedness thereby secured, nor the understanding of the plaintiff that interest should be charged thereupon. There was no redemption from such foreclosure sale, and the plaintiff did not have actual notice of the sale or the amount bid until six months subsequent to the time of such sale, although her brother was her tenant, and cultivating the premises during the foreclosure proceedings, and boarded near said farm, and upon whom due notice of foreclosure proceedings were served as the party actually in possession, as required by law. The plaintiff never objected to the sale on account of the amount claimed in the notice of sale being in excess of the amount legally due upon the mortgage debt, and she has never tendered to plaintiff any amount upon said mortgage debt, and the defendant did not at the time of sale, nor at any other time, ever receive from the sheriff or other person any money as the proceeds of said sale.

This action was commenced in the month of November, 1892, to recover the sum of \$1,032.80, being interest so added to the principal of said note, and claimed to be the surplus over and above the amount actually due on said note and mortgage at the time of such foreclosure sale. On the trial in the court below the defendant in open court tendered to the plaintiff a deed of conveyance to the

plaintiff of the premises described in said mortgage upon the payment to this defendant of the sum of \$3,000, without interest or costs of said foreclosure suit, which tender was refused by the said plaintiff. Briefly, the case is this: Plaintiff or her husband, on July 10, 1885, or before that time, received of defendant \$3,000, which sum was to be without interest, as they claim, and payable in five years, secured by a mortgage on her land, worth at the time of the foreclosure sale, December 5, 1890, not exceeding the sum of \$2,500, and at no time since of greater value than \$3,000; and they now assert their legal right to pay and satisfy the note and mortgage with accrued interest from the maturity of the note, July 10, 1890, with the mortgaged property of less value than the amount legally due on the mortgage, and then, in addition to this, to recover a judgment against the defendant of \$1,032.80, an alleged surplus on the foreclosure sale, and which accrued, if at all, by an error or mistake on the part of defendant's attorney in the computation of the interest on the note and mortgage. If this action is sustained, the plaintiff will recover a judgment for \$1,032.80, for which she never paid any consideration whatever. We have no hesitation in saying that such a claim is unconscionable, and it would be a reproach to our jurisprudence if the defendant cannot be afforded relief.

In view of the admission of the parties as to the agreement not to pay interest on the \$3,000, we are not necessarily called upon to decide whether the note drew legal interest; but when we examine the mortgage, and find therein a clause wherein it is stated that it is given to secure this note of \$3,000 and interest, and then also stating that the mortgage is given to secure the same note without interest, we are not surprised that the attorney construed the note as drawing interest. In the case of *Hoopes v. Collingwood*, 10 Colo. 107, (19 Pac. Rep. 909,) the court assumes that a note similar in form to the one in this case drew legal interest. Such uncertainty as to whether the note and mortgage drew interest would fully justify the findings of the court below that the interest so added was done in the utmost good faith by the attorney, and we do not decide but what he was legally right in such computation, so far as relates only to the interest on the note. But, in addition to this complex question of the payment of interest involved by the terms of the

note and mortgage, it now appears that at the time of the execution of the note and mortgage the parties understood that neither the note nor mortgage should draw interest at any rate. Of this latter fact the defendant's attorney does not appear to have been notified, or aware of that fact at the time he so computed the interest on the note or at the time of the foreclosure sale. If he had known of this important and conceded fact, it would have thrown such light upon the question as would undoubtedly have induced him to have foreclosed the mortgage without any claim for the five-years interest, and thus have prevented this unfortunate litigation. Assuming this to be so, we then think that such attorney was misled by his ignorance of an existing material fact, known, it is true, to both parties, but unknown to defendant's attorney, who resided many hundreds of miles distant from his client.

Now, construing the note and mortgage together, and conceding that they did not by their terms draw interest until due, and that the attorney, in computing the interest on the note from its date to maturity, made a mistake in the law applicable thereto, is the defendant without remedy or relief? If we are correct in our view of the fact that the attorney was misled by his ignorance of the existence of a material fact by the agreement of the parties that the note should not draw any interest, then we have to deal with two mistakes,—one of law and one of fact; and, where both combine to constitute any injury to a party, he is entitled to equitable relief, especially where such circumstances surround the case as are presented by this record. We are not unmindful of the general rule that for a mistake of law, pure and simple, there is generally no remedy or relief, but there may be relief afforded in equity if the surrounding circumstances are of such a nature that the adverse party is seeking to avail himself of the opportunities afforded by the mistake, and attempting to enforce an unconscionable advantage without consideration, and the other party not being blamable. *Benson v. Markoe*, 37 Minn. 30, (33 N. W. Rep. 38.) In the case just cited numerous authorities are quoted to show that in mistakes of law in certain cases relief may be afforded, and the case itself is an instructive one upon this question. It is also there held that such relief may be afforded for the mistake of only one of the parties, and that the mistake need not be mutual. But in cases where there

is a mixed question of mistake of law and fact, or of fact alone, relief can be granted, especially if the opposite party will not thereby be injured.

The plaintiff claims that the defendant did not offer to pay plaintiff the value of the use of the premises by defendant after the expiration of the time for redemption, amounting to \$200; and that, if the defendant seeks equitable relief, he should, at the time of the tender of the deed to plaintiff, have tendered or offered to pay her this amount. But was this essential? This is not a case between a trespasser or wrongdoer or even a tenant upon the land of plaintiff. The defendant was a mortgagee in possession after forfeiture of the conditions of the mortgage by the implied, if not actual, consent of the mortgagor. Plaintiff claims that the mortgage was legally foreclosed, and it appears that at such time she was not in the actual possession. By bringing this action in the manner and for the purpose she did she substantially asserts the right of the defendant to the possession thereof, and admits thereby that he obtained lawful possession of the premises after the conditions broken, and after the time for redemption expired. Now if, as a mortgagee, he lawfully obtained possession of the premises after forfeiture, the mortgagor could not recover possession without satisfying the mortgage. *Pace v. Chadderdon*, 4 Minn. 499, (Gil. 390.)

This would be so whether there was a valid foreclosure or not. At the time of the foreclosure sale the principal sum of \$3,000 and accrued interest from July 10, 1890, to time of sale was actually unpaid; and at the time of the trial of this action, June 20, 1893, there was more than \$600 of accrued interest, calculating the same from July 10, 1890, upon the principal of \$3,000, if there had been no foreclosure at all. This amount of interest due and payable after the conditions in the mortgage were broken amounted to three times the amount of the value of the use of the land by defendant as found by the court. If, therefore, the defendant was lawfully in possession of the premises, there is no equity in the plaintiff insisting that as a basis of relief to be afforded the defendant he should have tendered to the plaintiff the value of the use of the premises, viz. \$200, while the defendant was in the possession thereof.

If there shall be a vacation and annulling of the said mortgage sale, and a resale of the premises under a mortgage foreclosure sale

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in accordance with the order to be made herein, then the question of rent or value of the use of the premises can be adjusted by the parties or the court, and the true amount found due on said mortgage, if the proper and legal application is made for such purpose.

The defendant was entitled to the affirmative relief asked for in his answer, but the foreclosure could not be allowed to stand, and at the same time the plaintiff's action dismissed. The court, in addition to dismissing the plaintiff's action, should, upon the facts found, also have ordered that the sale be set aside, and a resale made. No new trial is necessary, but the case is remanded with directions to the court below to amend its conclusions of law and order for judgment, in accordance with this opinion.

(Opinion published 57 N. W. Rep. 132.)

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HENRY H. CORSON *vs.* REGINALD H. SHOEMAKER *et al.*

Argued Nov. 8, 1893. Reversed Nov. 29, 1893.

No. 8381.

**Real property is the subject of an action to reform the description of land in a deed.**

An action to reform the description of the real property in a deed is one, the subject of which is the real property, the title of which is sought to be affected; and the relief demanded consists in excluding the defendant from any interest therein, within the meaning of 1878 G. S. ch. 66, § 64, providing for the service of summons by publication.

**Evidence of defendant's nonresidence must be filed before publication of the summons.**

The filing of evidence that the defendant cannot be found in the state is an essential prerequisite to the service of the summons by publication. This evidence may consist, either of the return of the sheriff, or of affidavits by others of facts showing, *prima facie*, that the defendant cannot be found in the state, but in every case the evidence must be filed before the publication of the summons. The mere affidavit of the plaintiff, his agent or attorney, that he believes "that the defendant is not a resident of the state, or cannot be found therein," is not sufficient.

Appeal by defendants, Reginald H. Shoemaker and Amelia D. his wife, from a judgment of the District Court of Hennepin County, *Thomas Canty, J.*, entered May 22, 1893.

On March 23, 1874, the defendant Reginald H. Shoemaker and Eliza Fanny Shoemaker then his wife, sold to the plaintiff, Henry D. Corson, seventeen and a half acres of land in the northwest quarter of the southeast quarter of Section thirty four (34) T. 29, R. 24, in Minneapolis for \$9,000 and received pay therefor. By mistake a part of the land, about eight feet wide and forty rods long on the south side was not embraced in the description of the land in the deed. Eliza Fanny Shoemaker died testate in 1875. She devised all her real estate to her husband. The will was proved and all her real estate was by decree of distribution assigned to him. He afterwards married the defendant, Amelia D. Shoemaker, and they resided at Pasadena, California. On February 8, 1893, they conveyed this strip of land to Patrick J. Finnegan, but the deed was not recorded.

This action was commenced February 17, 1893, to reform the deed of 1874 to plaintiff and obtain title to the land so omitted. The sheriff made return on the summons February 18, 1893, that the defendant could not be found in Hennepin County, but this return was not filed in the Clerk's office until April 21, 1893. The plaintiff's attorney made affidavit February 24, 1893, that he believed that the defendants were not residents of the State of Minnesota and could not be found therein and it was filed on the same day. The summons was published six weeks, beginning March 4, 1893. Proof of publication and an affidavit of default were made, and evidence submitted to the Court and judgment entered May 22, 1893, for the relief demanded. The defendants appealed to this Court and assigned as error, among other things, that the trial Court did not acquire jurisdiction of the action, because the Sheriff's return was not filed before publication of the summons was commenced.

*Savage & Purdy*, for appellants.

This is a personal action. The entire object of the action is to determine the personal rights and obligations of the defendants. The suit is merely *in personam* and constructive service upon them is



ineffectual for any purpose. *Pennoyer v. Neff*, 95 U. S. 714; *Freeman v. Alderson*, 119 U. S. 185; *Lydiard v. Chute*, 45 Minn. 277.

This judgment is void for want of jurisdiction, because when the summons was published the sheriff's return of *non est inventus* had not been filed in the clerk's office. *Bardwell v. Collins*, 44 Minn. 97; *Blinn v. Chessman*, 49 Minn. 140; *Lane v. Innes*, 43 Minn. 137; *Smith v. Hurd*, 50 Minn. 503; *Chickering v. Failes*, 26 Ill. 507; *Bradley v. Jamison*, 46 Ia. 68; *Cummings v. Tabor*, 61 Wis. 185.

*Wm. B. McIntyre*, for respondent.

This is spoken of as an action to reform a deed. Yet, the real object, and the only one, is to settle and determine the legal title to the land. *Lane v. Innes*, 43 Minn. 137.

This action is the same in nature as an action to determine adverse claims, to remove a cloud, to set aside a deed for fraud, to foreclose a mortgage, and in all these cases it has been held that a statute may authorize the service of summons by publication. *Dillon v. Heller*, 39 Kans. 599; *Sweeley v. Van Steenburg*, 69 Ia. 696; *Arndt v. Griggs*, 134 U. S. 316; *Beebe v. Doster*, 36 Kans. 666; *Adams v. Coules*, 95 Mo. 501; *Crombie v. Little*, 47 Minn. 581.

There is nothing in any of the decisions of this Court to imply that the return of the sheriff must be made and filed as a condition precedent to publication, on the contrary, the inference from some of them is the reverse. *Crombie v. Little*, 47 Minn. 581.

Buck, J. This is an action to reform the description of real property in a deed, and the record thereof, with the usual prayer for general relief. It is alleged in the complaint that about the 23d day of March, 1874, Eliza Fanny Shoemaker was the owner in fee simple of certain real property situated in the county of Hennepin, in this state, and that about that date she and her husband, Reginald H. Shoemaker, one of these defendants, for the consideration of \$9,000, sold said property, and that the Shoemakers intended to execute a warranty deed thereof to plaintiff, but by the mutual mistake of the parties a part of the description of said property was omitted from said deed, and the deed was executed for only a portion thereof.

It is also alleged that said Eliza Fanny Shoemaker died testate in 1875, and by the terms of her will, and the probate proceedings thereon, all of the estate of which said Eliza F. Shoemaker died seised was assigned by the probate court to her husband, Reginald H. Shoemaker, and that subsequently the other defendant herein, Amelia D. Shoemaker, became the wife of said Reginald H. Shoemaker. It does not appear that the defendants or Eliza F. Shoemaker ever resided in this state, but the complaint alleges that the defendants, at the time of the commencement of this action, were residents of the state of California. The plaintiff, proceeding in the action, attempted to obtain constructive or substituted service of the summons upon the defendants, upon the grounds that they were nonresidents of the state, and that the defendants claimed a lien and interest in the real property which was the subject of the action, and also that the relief demanded consisted in excluding the defendants from any interest therein.

1878 G. S. ch. 66, § 64, provides that, when the defendant cannot be found within the state,—of which the return of the sheriff of the county in which the action is brought, that the defendant cannot be found in the county, is *prima facie* evidence,—then, upon the performance of certain other conditions, not necessary to state here in full, the plaintiff may publish a summons, in certain cases, as provided in said section. The service of a summons by publication called “constructive or substituted service,” is not in accordance with the common law; and resting, as it does, upon statutory law, it must be strictly followed. It is a constitutional guaranty that no person shall be deprived of his property without due process of law, and is too fundamental to need discussion. A part of this due process of law is due notice; something to bring a party before the court for hearing and judgment, or to warn him that judicial proceedings have been, or are to be, taken against him or his property. Having due notice, he can appear, or remain in default, at his peril. The notice to be given, then, for such purpose is not one of idle ceremony, or mere formality. If personal service of notice or process cannot be made upon a party, then comes constructive or substituted service; and here we must apply the rigid rules of the law, even though, in some cases, it may lead to seeming hardship.

The law recognizes the right of a nonresident to own real property within this state. It guards that right with jealous care, but, while doing so, provides that our own citizens shall not be powerless to enforce their own rights against the nonresident property holder. But it has exacted as a condition precedent to acquiring jurisdiction in such proceeding, where large property interests may be involved, and where the rights of nonresident property holders are to be adjudicated, that the statutory authority must be followed, both in the letter and spirit of the law. This must appear affirmatively. Presumptions will not do. The question here raised is this: Was the plaintiff authorized to proceed with the publication of the summons before the certificate of the sheriff, upon the summons, that the defendant could not be found in his county, was filed with the clerk of the court? Or, in other words, was it a complete return, within the meaning of the law, until it was so filed?

The affidavit of the plaintiff's attorney, as required by law in such cases, was filed with the clerk in due time; but the summons with the sheriff's certificate thereon of defendants' nonresidence was not filed with the clerk of the court until April 8, 1893.

The first publication of the summons was March 4, 1893; and the last one, April 8, 1893. When a sheriff serves a summons personally the proof of such service is made by his certificate thereof. 1878 G. S. ch. 66, § 68. When he is required to make a return that the defendant cannot be found within his county, which return thereby becomes *prima facie* evidence of the fact that he cannot be found in the state, we think that, in order to have that return complete, it includes the sheriff's certificate of such fact, and the filing of the same with the clerk of the court. When this is done the return is perfected, and becomes a matter of record, and *prima facie* evidence of the facts therein recited, as provided by statute. The filing of the affidavit and return would not exclude other competent proof of the nonresidence of the defendants. This evidence may consist either of the return of the sheriff, or of affidavits of others of facts showing, *prima facie*, that the defendants cannot be found in the state, but in every case the evidence must be filed before the publication of the summons. The mere affidavit of the plaintiff, his agent or attorney, that he believes "that the defendant is not a res-

ident of the state, or cannot be found therein," is not sufficient. There is no such proof in this case, however. The omission of the legislature to provide in the law, by express terms that the return should be filed with the clerk of the court, while it did so provide for the filing of the affidavit, was doubtless due to the fact that the return of the sheriff was not deemed complete until filed with the clerk of the court. In the case of *Barber v. Morris*, 37 Minn. 194, (33 N. W. Rep. 559,) it was held that, under the section of our statute above quoted, the filing of the affidavit there required to be made by the plaintiff, his agent or attorney, was a condition precedent to an authorized publication of a summons. And in 1 Rice Ev. 217 the rule laid down is that "the admissibility of a return depends upon the fact that it is duly filed, as, upon filing, it becomes a part and parcel of the record in the case." In attachment proceedings, however, under the statute, "the original writ, with the sheriff's certificate of attachment of property indorsed thereon, is admissible in evidence on the trial of the action, although the same was not returned and filed with the clerk of the court until long after the entry of the judgment." *Cousins v. Alworth*, 44 Minn. 505, (47 N. W. Rep. 169.)

We do not decide that the officer must forthwith file the summons in the clerk's office upon the making of his certificate, indorsement, or statement upon the summons that the defendant cannot be found in his county; but we do hold that the return, within the meaning of the statute, is not complete, so as to authorize the publication of a summons, until it has been so filed.

We now pass to the more important question,—whether, if all of the conditions necessary to an authorized publication of a summons have been complied with, under 1878 G. S. ch. 66, § 64, the courts of this state can acquire jurisdiction, so as to proceed lawfully for the reformation of a deed, where there has been a mutual mistake of the parties, in omitting from the deed a part of a description of the land paid for by the plaintiff, and intended to be inserted in the deed. We say "more important question," because the conditions precedent for an authorized publication of a summons are easily complied with by the careful practitioner. But, if every statutory prerequisite in this respect has been strictly complied

with, the whole proceedings would be utterly useless, if no jurisdiction could thereby be acquired over the subject-matter, in cases of this kind. We have already referred to the jealous care with which the state, in her sovereign capacity, protects the property and rights of a nonresident, whose property is situate within our own boundaries. The contention of the defendants is that a state court is powerless, in an action of this kind, to protect its own citizens against the acts or mistakes of parties, where the defendant is a nonresident, and cannot be found within this state. If there had been a mistake made between the parties, to the injury or disadvantage of the nonresident, no one could question his right to come into our state, and, before our tribunals, have his deed reformed, and his rights protected. It is equally as important, and of as much consequence, that our own citizens have their rights tried and protected in the forum where the property is situate, and where it is the subject matter of the action, as that of the nonresident. The defendants seem to think otherwise. Before the rendition of the judgment in this action, the defendants appeared specially, and moved to set aside the service of the summons, upon the ground that the affidavit upon which it was based was untrue, and that defendants had no property in this state, and did not claim any interest therein, or lien thereon, at the time of the commencement of this action, and that at the time of the commencement of the publication of the summons the sheriff of Hennepin county had not made return that the defendants could not be found in said county, and that the subject of the action was not real property situated in the state of Minnesota; also that the relief demanded in the complaint does not consist in excluding the defendants from any interest in such property, or in any property. As part of the motion papers, an affidavit and deed of the defendant Reginald H. Shoemaker was used, stating that he had on the 8th day of February, 1893, deeded said premises, or a part of them, to one Patrick J. Finnegan, for the consideration of \$250.

The court below overruled the defendants' motion and the parties went to trial; the defendants appearing specially, and objecting that the court had no jurisdiction of the defendants. Judgment was rendered for the plaintiff, and defendants appealed from

said judgment upon the grounds that the district court did not have jurisdiction.

We think that the only use that the defendants could make, upon such a motion, of the papers introduced by them, was for the purpose of setting aside the service of the summons; and we understand that it was for this purpose that the affidavit of Shoemaker, and his deed to Finnegan, were introduced,—simply in aid of that motion. If otherwise, and the deed was used as a defense to the merits of the allegations in the complaint, it would be an appearance generally, and a waiver of the imperfect service of the summons. It will hardly be seriously claimed that the material allegations of a complaint stating a cause of action can thus be summarily disposed of by defendants' motion on affidavits. The main question, therefore, for us to determine, is whether, under our statute, the action can be maintained under a substituted service of the summons—that is, where there is no personal service of the summons on the defendant, within the jurisdiction of the court, and no general appearance entered by the defendants,—and was the judgment rendered in the cause valid?

1878 G. S. ch. 66, § 64, subd. 5, provides “that when the subject of the action is real or personal property in this state, and the defendant has or claims a lien or interest actual or contingent therein or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein,” then a duly-authorized service of summons may be made by publication. Where judgment is rendered in favor of the plaintiff in such case, and where there is no appearance of the defendant, he or his representative may, within one year after the rendition of such judgment, upon sufficient cause shown, be allowed to defend. 1878 G. S. ch. 66, § 66.

By 1878 G. S. ch. 75, § 1, any nonresident owning or claiming any interest in or lien upon lands lying within the state may appoint an agent, to whom notice shall be given of proceedings affecting the realty, and service of a summons may be made personally upon such agent, in which case such service is made as valid and effectual against the defendant as if made personally upon him within this state. Thus the nonresident owner of real prop-

erty situate here has it in his power to protect his rights, in such property if he chooses so to do.

In this case, the subject of the action is real property situate within this state. In the complaint, the plaintiff does not allege, in the words of the statute, that "the defendant has or claims a lien or interest actual or contingent" in the property, or that "the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein," but he alleges the facts bringing the case within the meaning and spirit of the statute.

The action is not one peculiarly personal in its nature, as contended by the defendants. The "*res*," as the defendants are pleased to term the written instrument, is not the substantive matter of the action. It is true the plaintiff seeks by his complaint to have the instrument reformed, and have a description of certain land omitted by mistake inserted in the deed. It is not expected that the nonresident defendant will go through the physical performance of inserting in the deed already executed the omitted description, nor make a new deed, including such description; but by 1878 G. S. ch. 75, § 32, it is provided that "the District Court has power to pass the title to real estate by a judgment without any other act to be done on the part of the defendant, when such appears to be the proper mode to carry its judgment into effect, and such judgment being recorded in the registry of deeds of the county where such real estate is situated shall while in force be as effectual to transfer the same as the deed of the defendant."

Construing all of the statutory provisions upon the subject together, we can readily see how shadowy and unsubstantial is the claim of the defendants that the substantive matter of this action is not the exclusion of the defendants from any interest in the land specifically described in the complaint. The real object of the action is to pass the title of the premises, the description of which was omitted from the deed, from the defendants to the plaintiff, who has paid therefor, and yet they negligently or wrongfully refuse to convey it to this plaintiff. They would do so, if they were honest, instead of attempting, by sharp practice, to convey the premises to Finnegan before the discovery of the mistake. The deed is not the title; it is the evidence of it; and such title may

pass by the judgment of the District Court, in proper cases, without the execution of any deed. And if a deed is not necessary, why should its reformation be the substantive matter or real object of the action? That it should be reformed is proper. Sufficient evidence to show that it should be reformed must necessarily be given, but the reformation given by law may be by judgment, and not by a new or reformed deed. The defendants insist that the proceeding for the reformation of a deed is one which has descended from the ancient court of chancery, and that the jurisdiction, in such cases, has neither been extended or abridged by the legislature. Now, while it may be necessary to invoke certain equitable rules or principles in an action of this kind, yet the state has provided, by statutory law, the very method or manner of procedure to determine questions affecting the title to or an interest in real estate within its boundaries.

If the defendant agreed to convey a parcel of land, the description of which land was, by mutual mistake, omitted from the deed, the legal title was still in the defendant. If so, then he had real property in this state, which was the subject of the action. An interest in real estate might include the title. Bishop, Cont. § 1290, says that the expression, "lands, tenements, or hereditaments," includes everything inheritable,—all real estate, in the largest signification of the term,—but that the phrase, "any interest in or concerning them," is still broader; and, in the same work, § 1292, that "the interest in or concerning realty contemplated by this statute may be defined as not only including what is obviously real estate, but also as extending to every sort of legal or equitable ownership, however slight, in whatever is deemed real property, whether at law or equity." Now, when the plaintiff seeks to obtain title to the specific land described in his complaint, is it not an action against a party who has or claims a lien or interest, actual or contingent, in real estate, and that by such action the relief demanded consists, wholly, in excluding the defendant from any interest or lien therein?

Is there any reason or logic in saying that this action is brought for any other purpose? And the authority does not rest in any ancient court of chancery practice, or under any ordinary equitable power or jurisdiction of the District Court, but the procedure is



based upon a positive authority and power conferred by statute. This statute is not to be rendered inoperative by any such construction as is placed upon it by defendants' counsel. It is the very essence of wisdom that such a statute should exist, and this case well illustrates that wisdom, and its necessity. It is a statute passed in the interest of good government, as well as for the protection of private rights. Equity will never cease to be a part of the due administration of the laws of this country. Into very many of our cases it must necessarily come, for the just and rightful disposition of them. The right which enables a party to hold property begets the power to protect it. The right to bargain and purchase it carries with it the right to enforce that bargain. These rights are inseparable, and the duty of the sovereign power to provide authority in this respect is unquestionable. If the remedy in equity is not complete in all respects, including the procedure, then we think it the duty of the legislature to provide for such further remedy or procedure as will make the right effectual. Because an action has the elements of such legislative power, the party is not deprived of the right to invoke the beneficial and just rules of equity.

The subject of the action being within the state, it has the legislative power to determine the method of procedure by which the rights of parties in regard to such subject shall be determined, and equity may be called upon to assist and guide in the determination of such legal right. A man who comes into our state, and purchases real property, should be amenable to our laws respecting that property. Not that our sovereign power is so potent that it can send its process or notice into the forum of another sovereign power, and compel a party to appear here, and subject himself personally to the jurisdiction of our tribunals, and bind himself, in such action as this, by a personal judgment, which is not here sought or contemplated, but that, when he voluntarily becomes the owner of real property within our jurisdiction, he must be deemed to yield to our law, when the title or interest in or to that particular piece of property is in dispute, or involved in controversy, and submit to our statutory method of procedure. He is beyond any obligation to respond personally, but his property must yield to the power of our state sovereignty. When that prop-

erty is threatened with waste, destruction, or damage, he can invoke that sovereign power for its protection, although he may be the subject of another sovereignty. Nor can he escape from the taxation of that property which our government so protects. Taxation is one of the necessary prerequisites for that protection of his property which he has a right to invoke, although never within this state. Nor will it be seriously contended that we have not the right to tax lands situate within our state, although owned by nonresidents. And have we not the right to enforce the payment or collection of such taxes by sale of such lands, if necessary, and, if the proceedings are regular, will not the sale of such lands for such purpose (if the lands are not redeemed) divest the title of the nonresident owner, and vest it in the purchaser at the tax sale? Are the proceedings for the collection of taxes really any more in the nature of a proceeding *in rem* than in this action? Where is the distinction? The property is not seized until after judgment. We do not proceed directly against the land. The service of the notice to the nonresident owner is by publication, not personal. No personal judgment is rendered, nor can it be rendered, against him, but the land is the primary matter or subject of the action or proceeding. Beyond the land, the judgment does not reach. It is not a general judgment, and only operates upon the specific land which has been taxed. That is the effect of a judgment in an action of this kind. It only reaches and operates upon the land described in the complaint, and is not a general judgment operating upon other property. It is true that this court has held that a proceeding for the enforcement of the payment of taxes upon real property is a proceeding *in rem*. *Chauncey v. Wass*, 35 Minn. 1, (25 N. W. Rep. 457,) and (30 N. W. Rep. 826.) Yet there is no actual seizure of the land by notice, attachment, or any legal process, for the purpose of bringing the property under the control of the court. Even in attachment proceedings, confessedly operating *in rem*, there is no actual seizure of the real property by the sheriff, but a certified copy of the writ of attachment, and his return thereon, is left in the office of the register of deeds, and a copy served upon the party, if he can be found in the county, and no other act or ceremony is needed. 1878 G. S. ch. 66, § 151. It is only constructive service, and a summons by publication may follow, in case the defend-

ant is a nonresident. In actions of this nature, the complaint is filed with the clerk of the court, and becomes a public record; and by 1878 G. S. ch. 75, § 34, a *lis pendens* is authorized to be filed in the office of the register of deeds of the county where any interest in real property affected is situate, or where such real property is involved or brought in question.

Now, such a complaint and *lis pendens* each describes particularly the property affected by the action, and the judgment sought affects the land only so described. If this is not an action *in rem*, it certainly is one in the nature of such an action. The land so particularly described is, by the filing of the complaint and the filing of the *lis pendens*, as effectually brought within the control of the court as it is in attachment proceedings. Both records, together, are notice to the public of the right claimed by the plaintiff in the land, and operate as effectually as notice to the defendants of the plaintiff's claim as the filing of the attachment, for the complaint would be filed in the same court, and the attachment and *lis pendens* filed in the same Register of deed. In such cases, the judgment rendered is based upon substituted service, and the enforcement of the judgment operates only upon property within the jurisdiction and control of the court. In such cases, we are not compelled to soar after the infinite, nor delve after the unfathomable, in search of refined distinctions without substantial differences.

The plaintiff does not rest his cause of action upon the inherent powers of a court of chancery, nor upon its general jurisdiction over equity causes, where it is contended such powers are exercised only *in personam*, but upon the statutory power conferred upon our courts by legislative enactments. Of the constitutional power of the legislature to do this, we have no doubt. It seems to be generally admitted, in cases of partition and condemnation proceedings, that judgments of courts will bind the particular property of nonresidents, even though the service was by publication. The decree or judgment in this action will relate to the land described in the complaint, and not to any judgment *in personam*. If the title is adjudged and decreed to pass to the plaintiff, then, by the judgment and operation of law, he has at once constructive

possession, and the right of actual possession. Then he is placed upon an equal footing with other citizens who have legal title to real property, but who are not in the actual possession, or who do not reside thereon.

As to the authorities upon this question, both parties cite *Pennoyer v. Neff*, 95 U. S. 714; and it may be that there is language used by the judge writing the opinion, seemingly, warranting the claims of each party. But, taking the whole of the case in connection with the more recent decision of the same court in *Arndt v. Griggs*, 134 U. S. 316, (10 Sup. Ct. Rep. 557,) and the opinion of Judge Shiras in *Bennett v. Fenton*, 41 Fed. Rep. 283, we think that the very decided weight of authority sustains the views herein expressed. In the case of *Pennoyer v. Neff*, Mr. Justice Field stated the law relating to the jurisdiction in cases of the service by publication as follows: "Such service may answer in all actions which are substantially proceedings *in rem*. \* \* \* It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of property without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state, they are substantially proceedings *in rem*, in the broader sense which we have mentioned."

In the case of *Hart v. Sansom*, 110 U. S. 151, (3 Sup. Ct. Rep. 586,) it is said that "it would doubtless be within the power of the state in which the land lies to provide that if the defendant is not found within the jurisdiction, or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose." This is quoted with approval by the court in *Arndt v. Griggs*, *supra*, where it is further said that it follows that if a state has power to bring in a nonresident by publication, for the purpose of appointing a trustee, it can, in like manner, bring him in, and subject him to a direct decree. A part of the syllabus in the case last cited is as follows: "A state has power

by statute to provide for the adjudication of titles to real estate within its limits, as against nonresidents who are brought into court only by publication." In the case of *Huling v. Improvement Co.*, 130 U. S. 559, (9 Sup. Ct. Rep. 603,) the law is thus stated: "The owner of real estate, who is a nonresident of the state within which the property lies, cannot evade the duties and obligations which the law imposes upon him in regard to such property by his absence from the state. Because he cannot be reached by some process of the courts of the state, which, of course, have no efficacy beyond their own borders, he cannot therefore hold his property exempt from the liabilities, duties, and obligations which the state has a right to impose upon such property, and in such case some substituted form of notice has always been held to be sufficient warning to the owner of the proceedings which are being taken under the authority of the state to subject his property to those demands and obligations." The power, therefore, of the legislature to pass laws for the adjudication of title to real estate, or of any interest therein, as against nonresidents who are brought before the court only by publication, ought to be deemed settled. That this power has been fully and sufficiently exercised by the legislative enactments referred to, we think fully appears. We should be very reluctant to hold that our laws are impotent to perfect the title to lands held by our own citizens because the nonresident does not come within the jurisdiction of our courts, and submit to their jurisdiction. Any other construction of our laws would leave our titles, frequently, at the mercy of a nonresident owner, and the security of such title, and the welfare of the state, demand that the laws pertaining thereto be upheld.

But, by reason of the imperfect service of the summons herein, the judgment of the court below is reversed.

(Opinion published 57 N. W. Rep. 184.)

*In re* MATTHEW ELLIS' ESTATE.

Argued Nov. 10, 1898. Affirmed Dec. 6, 1898.

No. 8455.

55 401  
28LRA287H  
52LRA201n**Collusion to obtain divorce does not affect the jurisdiction.**

Collusion and agreement between the parties to an action for divorce as to the judgment to be rendered does not affect the jurisdiction, nor render the judgment entered void.

**Probate Code properly enacted.**

The act of 1889 known as the "Probate Code" was properly passed.

**If contents of a lost or destroyed will cannot be shown.**

Proof that a deceased party executed a will, which he afterwards destroyed, while *non compos* will not defeat an application for an administrator, unless its contents can be proved with such degree of certainty that it may be established as a will.

**Authentication of copy judgment of another state to be evidence here.**

A copy of the proceedings of a court of another state is admissible here if authenticated according to the statute of this state, though not according to the act of congress.

**Judgment Roll is proof of the judgment record.**

An authenticated copy of a judgment roll is evidence of all that is properly contained in it, and is evidence *prima facie* that the judgment was properly entered in the judgment book.

**Place of trial as affecting jurisdiction.**

That an action was tried in a county other than that declared by statute the proper county for its trial does not go to the jurisdiction.

**Wife induced by intimidation to bring suit for divorce.**

That the wife, the plaintiff in an action for divorce, was induced to bring it by persuasion, ill treatment, and threats by the husband that he would continue such ill treatment unless she brought the action, does not affect the validity of the judgment in a collateral proceeding.

**Voluntary appearance in the court of another state confers jurisdiction.**

Where, in an action in the court of another state for divorce, both parties voluntarily appear, and submit to the jurisdiction, they are bound by the judgment, and cannot avoid it in a collateral proceeding  
v.55M.—26

in this state by proof that when the action was brought and judgment rendered neither of them was a resident in that state, and that both were residents in this state.

Appeal by Rachel Ellis, Jane Walker and Charles Ellis, from an order of the District Court of Ramsey County, *Chas. E. Otis, J.*, made May 24, 1893, denying their motion for a new trial.

Flora Ellis of St. Paul filed her petition in the Probate Court of Ramsey County, December 13, 1892, praying to be appointed administratrix of the estate of Matthew Ellis, deceased. She represented that she was his widow, that he died in that City December 7, 1892, intestate and without issue or surviving parent, and possessed of real and personal property valued at \$60,000. Jane Walker, a sister, and Charles Ellis, a brother, contested the application, on the ground that deceased executed a will giving to them a large part of his property which he did not revoke, while possessing testamentary capacity. Rachel Ellis also contested, on the ground that she was his widow and that a divorce obtained by her in Wisconsin at his request on March 27, 1884, was void for want of jurisdiction of the Wisconsin Court over the parties, they being residents of St. Paul, and that his subsequent marriage to the petitioner, Flora Ellis, on September 2, 1886, was void. The Probate Court on January 26, 1893, granted the petition and appointed Flora Ellis sole administratrix. The contestants severally appealed to the District Court. A return was made and the contention was heard March 22, 1893. It was shown that deceased made a will in July, 1891, which he destroyed December 31, 1891, but its contents were not satisfactorily proved. He was in ill health and his brother and sister claimed he had not testamentary capacity at the time he destroyed the will, but the Court refused to receive evidence of his incapacity to revoke the will, because the provisions of the will were not clearly and distinctly proved by two credible witnesses to the satisfaction of the Court. The Court found that the divorce was valid, that Flora Ellis was the lawful wife of the deceased, that he died intestate and that she was entitled to letters of administration upon his estate and directed judgment affirming the determination of the Probate Court. The

appellants made and settled a case containing all the evidence and their exceptions and moved for a new trial. This was denied and they appealed.

*F. G. Ingersoll and Chas. N. Bell, for appellants.*

A court sitting in divorce proceedings is a court with local, limited, special and statutory jurisdiction only. It has no authority whatever to hear or consider divorce matters between nonresidents or citizens of sister states. *State v. Armington*, 25 Minn. 29; *Ditson v. Ditson*, 4 R. I. 87; *Hoffman v. Hoffman*, 46 N. Y. 30; *People v. Dawell*, 25 Mich. 247.

The subject matter of the divorce action was not the question of divorce in general, but was the marriage relation between the parties to that suit; and the subject matter neither was, nor could be, within the jurisdiction of the Wisconsin Court. The parties had no domicile within the State from which the Court derives its power. The State itself, having no jurisdiction over the marriage relation between such parties, could confer none upon its courts. *Reed v. Reed*, 52 Mich. 117; *Thompson v. Whitman*, 18 Wall. 457; *Prosser v. Warner*, 47 Vt. 667; *Sewall v. Sewall*, 122 Mass. 156; *Commonwealth v. Blood*, 97 Mass. 538; *Williams v. Williams*, 68 Wis. 58; *Cook v. Cook*, 56 Wis. 195.

The divorce on its very face is void, as it shows there was no issue on the question of residence, and shows consent, collusion, a trade, and is not entitled to respect as a decree when presented in our Courts. The fact that the Wisconsin court attached to it its name and seal does not and cannot purge it of its invalidity. *Young v. Young*, 17 Minn. 181; *Olmstead v. Olmstead*, 41 Minn. 297; *Bomsta v. Johnson*, 38 Minn. 230.

It nowhere appears that the judgment or order for judgment was ever entered in the Judgment Book of St. Croix County. Until a decree or judgment is entered in the Judgment Book, it is not operative. *Rockwood v. Davenport*, 37 Minn. 533.

While the contents of a lost will cannot be proved unless the evidence is clear, full and satisfactory, it need not be such as to remove all reasonable doubt as to the substantial parts of the paper.



If the contents of a lost will are not completely proved, probate will be granted to the extent to which they are proved. *Thornton v. Thornton*, 39 Vt. 122; *In re Page*, 118 Ill. 576; *Early v. Early*, 5 Redf. 376; *Kitchens v. Kitchens*, 39 Ga. 168.

The Probate Code of 1889 never became a law as required by the Constitution. Art. 4, § 20. The Journals of the House and Senate are before this Court, and it will take judicial notice of the records and journals. The Probate Code is House File No. 1063. It was read the first and second times and referred to the committee of the whole. There was no suspension of the rules, or vote on a suspension of the rules, when this bill was read the second time on March 25. On April 17, the bill was recommended to pass by the committee of the whole. On April 18, the bill was read the third time and put upon its final passage. *Hull v. Miller*, 4 Neb. 503; *Spangler v. Jacoby*, 14 Ill. 297; *People ex rel v. Mahaney*, 13 Mich. 481; *Fordyce v. Godman*, 20 Ohio St. 18; *McCulloch v. State*, 11 Ind. 424.

*M. L. Countryman and Stringer & Seymour*, for respondent.

A judgment of divorce cannot be impeached in a collateral proceeding, merely because the parties to it had been guilty of collusion and fraud on the court. So long as the judgment stands and until directly assailed, it is entitled to full faith and credit as a judgment, and is conclusive between the parties. *Hood v. Hood*, 11 Allen, 196; *Greene v. Greene*, 2 Gray, 361; *Baugh v. Baugh*, 37 Mich. 59; *Zoellner v. Zoellner*, 46 Mich. 511; *Sanford v. Sanford*, 28 Conn. 628; *Smith v. Smith*, 28 Ia. 516; *Cone v. Hooper*, 18 Minn. 531; *Hotchkiss v. Cutting*, 14 Minn. 537; *Kinnier v. Kinnier*, 45 N. Y. 535.

Conceding that the question of Rachel Ellis' residence was a jurisdictional one, yet it belonged to that class of jurisdictional facts which the Wisconsin court had to determine from the evidence; and if the Court found this fact upon insufficient evidence, or without competent evidence, and thereupon proceeded to exercise jurisdiction, the action of the Court in this respect was not void, but merely erroneous, and was not subject to collateral at-

tack. *Waldo v. Waldo*, 52 Mich. 94; *Ellis v. White*, 61 Ia. 644; *Carlisle v. Carlisle*, 96 Mich. 128; *Elliott v. Wohlfrom*, 55 Cal. 384; *Arthur v. Israel*, 15 Colo. 147; *Simons v. Simons*, 47 Mich. 253.

If the appellants were unable to properly prove the contents of the will, proof of incapacity to revoke it would be unavailing. The appellants attempted to prove the contents of the will, but failed to do so. The testimony as to the contents of the will was of such a character that it is impossible to arrive at a determination of its provisions. *In re Russer*, 6 Demorest, 31; *Sheridan v. Houghton*, 6 Abbott, N. C. 234; *McNally v. Brown*, 5 Redf. 372; *Kidder's Estate*, 66 Cal. 487; *Todd v. Rank*, 13 Colo. 546.

There is no proof that the Probate Code was not properly enacted. This Court has effectually disposed of the objection that the Journal fails to show a suspension of the rules. *State v. Peterson*, 38 Minn. 143; *Supervisors v. People*, 25 Ill. 163.

GILFILLAN, C. J. Appeal from an order appointing an administratrix. Stating the history of the matters involved in chronological order, in 1869 Matthew Ellis and Rachel Cottrell, then residents in Wisconsin, intermarried in that state, and resided therein—the latter part of the time at Hudson—from the time of their marriage till October, 1883, when they came to St. Paul, Minnesota. February 29, 1884, she commenced by proper personal service of summons an action against him for divorce in the Circuit Court for the county of St. Croix, (in which Hudson is situated,) in said state. Her complaint was sworn to by her, and it alleged, among other things, that she then was, and for more than three years last past had been, a resident of said county and state, and that for more than a year prior to bringing the action the defendant had willfully deserted and refused to live and cohabit with her; and it demanded judgment dissolving the marriage, and requiring the defendant to pay her the sum of \$8,000 alimony. The defendant filed an answer, not raising any substantial issues, and the parties made and filed a stipulation agreeing upon the alimony at \$6,150 and a horse, carriage, robes, etc., and all the defendant's household goods, except his library. The answer and stipulation suggest an agreement between the parties for a divorce,—a sug-

gestion which ought to have caused the court, and we must assume that it did, to require strict and ample proofs of the facts showing a cause of action, and which would have been influential upon an application to vacate the judgment rendered on the ground of collusion and fraud upon the court. But that did not go to the jurisdiction of the court over the case. A reason for deciding against the plaintiff, or a fraud upon the court as to the judgment to be rendered, or the character of the motive that induced the bringing the action, does not affect the jurisdiction. March 27, 1884, judgment in that action was rendered, dissolving the marriage between the parties, and allowing the plaintiff therein the alimony stipulated; and that alimony was paid. September 2, 1886, Matthew Ellis and Flora Wilson intermarried, and they lived together as husband and wife until December 7, 1892, when he died in St. Paul, Ramsey county, in this state.

Flora Ellis, the second wife, filed a petition in the Probate Court of said county, stating the necessary jurisdictional facts, alleging that Matthew Ellis died intestate, and that she was his widow, and asking to be appointed his administratrix. On the day appointed for the hearing Rachel Ellis appeared, denied that Flora was the widow, alleged that she was the widow, and asked that she be appointed administratrix. At the same time appeared a brother and sister of deceased, representing that the deceased had made a will, still in force, and asking the court to make the proper order or decree in the premises. The Probate Court appointed Flora administratrix, and on an appeal to the District Court, in which the court heard all the parties, that court affirmed the decision of the Probate Court.

Before taking up the principal question in the case, the only one which seems to us of sufficient importance, as presented by the evidence, to call for consideration at any length, we will dispose of others of less importance. It is claimed by appellants that the act of 1889 known as the "Probate Code" was not passed in the house of representatives in the manner prescribed by the constitution, because it does not appear from the house journal that the bill was read on three different days, or that the rule was suspended, as required by the constitution. It is not clear to us what

the Probate Code has to do with the case, for the rule providing who shall be entitled to administration was the same under the prior law as under that act, and the evidence of a will offered was not sufficient to establish a will, not produced, either under the prior law or the Probate Code. Every bill signed and approved as required by the constitution is presumed to have been properly passed. And, as held in *State v. Peterson*, 38 Minn. 143, (36 N. W. 443,) the absence from the journal of either house of an entry showing that a particular thing was done, is no evidence that it was not done, unless the constitution requires the entry to be made; and there is no such requirement in respect to the reading of a bill on three different days, or its passage under a suspension of the rule. The objection, therefore, is not well taken.

Ellis executed two wills,—one in 1890, which he destroyed, with intent to revoke, in July, 1891, when he executed another. He destroyed that will, apparently with intent to revoke it, December 31, 1891. The appellants offered evidence tending to prove that at that date he had not sufficient mental capacity to make or revoke a will. On the respondent's objection this evidence was excluded, on the ground, as we understand, that it was immaterial, because there was not sufficient evidence of the will.

It must be apparent that, in order to defeat an application for the appointment of an administrator, proof of a will, not forthcoming, must be such as to show that it can be established. Proof that one was executed will not suffice without proof to a reasonable certainty of its contents. To establish a will without such proof would be to make a will for the party.

The evidence afforded no means of determining with any degree of certainty what disposition the will of July, 1891, made of the testator's property. The most that could be made of it was that it left to Flora Ellis one-third of the property, and something more, but how much or what more did not appear; that there were specific devises or legacies to others, but to whom, except one, or how much to any one of them, did not appear; and that there was a residuary devisee or legatee, but who, did not appear; and there were no means of determining how much would be the residue.

Of course, a will, not produced, could not be established on any

such evidence, and evidence that the testator had not capacity to revoke it would be immaterial.

That leaves only the question which of the two, Flora or Rachel, was the widow of Matthew Ellis? That depends on the validity of the judgment divorcing Rachel and Matthew.

It is objected that the judgment was not sufficiently proved, because—First, the authentication was not in conformity with the act of congress; second, the copy authenticated is a copy of the judgment roll, and it does not appear the judgment was ever entered in the judgment book.

When the proceedings of a court of another state are authenticated as provided by act of congress, they must be received as evidence; but it is competent for the legislature of each state to provide that proof of such proceedings may be received in the courts of such state by authentication less than is prescribed by act of congress, and the authentication in this case was in accordance with the statute of the state.

We will assume that the laws of Wisconsin are the same as our own in respect to entering judgments and making up the judgment rolls. The roll, or an authenticated copy of it, is evidence of all that is properly contained in it, including the judgment, and is evidence, *prima facie* at any rate, that the judgment was properly rendered and entered, so as to have effect.

It is objected to the judgment that by the laws of Wisconsin (which on this point were proved) the action for divorce is a local action,—that is, that it is properly triable in the county where the parties, or one of them, resides; that by the pleadings it appears that the only county in which either party resided was the county of St. Croix, but that the hearing in the action was had in the county of Eau Claire. And it is urged that in hearing the case the court acted without jurisdiction. We are not referred to any decision in that state as to the effect on the jurisdiction of a trial (by the same court) in one county when the statute provides that the trial ought to be in another. In this state it might be an irregularity, and, if objected to, error, but would not affect the jurisdiction of the court so as to render the judgment void. *Gill v. Bradley*, 21 Minn. 15; *Kipp v. Cook*, 46 Minn. 535, (49 N. W.

257;) *Tullis v. Brawley*, 3 Minn. 277, (Gil. 191.) And we assume that the rule is the same in Wisconsin.

The appellants offered, in order to impeach and avoid the judgment, to prove that Rachel Ellis was compelled to bring the action by the defendant's course of conduct towards her, which consisted in endeavoring to persuade her to bring the action; that during the period of two years he abandoned her at different times, at first for a week at a time, gradually lengthening the periods of absence until they became three months at a time, leaving her unprovided with the necessaries of life, and threatening, whenever he returned, that he would continue that course of conduct unless she consented to bring the action, and that unless she so consented he would run away, and leave her without a penny; and also to prove other acts of his of a similar character, all of which had such effect upon nerves and health and mental condition that she was not a free agent, in which condition she brought the action; from all which it is claimed she brought it under duress. Whether at any time, and especially whether after she has received and enjoyed the fruits of the action, and has acquiesced for years, until the defendant has married again, and has died, and there is left solely the matter of distributing his property, a woman plaintiff could, because of such facts, obtain any relief in the same action, we will not undertake to say. Certainly it would be no ground for assailing the judgment in a collateral proceeding at any time. In the majority of actions for divorce by wives on the ground of desertion or ill usage, the same claim of duress to bring the action might be made as in this case, and the stronger the grounds for divorce the stronger would be the ground to avoid the judgment whenever it might be convenient or profitable to do so. The court properly excluded the evidence.

The principal question in the case was presented by the appellants' offer to prove, and the ruling of the court excluding the evidence, that at the time of bringing the action in Wisconsin and of the divorce decree neither of the parties to it was a resident of that state, but that both were residents of this state. It is claimed for the evidence that, if admitted, it would have shown that the Wisconsin court had no jurisdiction of the subject-matter

of the action, to wit, the marital relation between the parties; that consequently the decree was void; Rachel remained the wife, and is now the widow, of Matthew; and that the marriage with Flora was void.

The question thus raised is of great importance, and difficult to satisfactorily determine. It is an undisputable general proposition that the tribunals of a country have no jurisdiction over a cause of divorce, wherever the offense may have occurred, if neither of the parties has an actual, *bona fide* domicile within its territory. This necessarily results from the right of every nation or state to determine the *status* of its own domiciled citizens or subjects without interference of foreign tribunals in a matter with which they have no concern. But when in the court of a state an action for divorce is brought, and a decree of divorce rendered, the court is presumed to have determined the facts essential to its jurisdiction, among them the residence of the parties.

When, as between whom, and to what extent is such determination binding in the state in which the parties are in fact residents? The cases in which the question may arise may be divided into three classes:

*First*, in proceedings between the State of the parties' actual residence and one of the parties;

*Second*, in proceedings between the parties in the state of their actual residence, where the divorce in the other state was procured on the application of one of them, the other not appearing in the action to procure it;

*Third*, in proceedings between the parties when both voluntarily appeared in the action in which the divorce was granted, and consented to the jurisdiction, or that the court might determine the facts on which the jurisdiction depended.

In the second class of cases it was settled that a judgment of another state can be assailed on the ground of want of jurisdiction in the court to render it, the decisions have been practically uniform that the party who did not submit to the jurisdiction is not bound by the judgment.

Of the decisions in cases coming under the first class we refer to four,—*Hood v. State*, 56 Ind. 263; *Van Fossen v. State*, 37 Ohio

St. 317; *People v. Dawell*, 25 Mich. 247; and *State v. Armington*, 25 Minn. 29,—all cases between the State of actual residence and one of the parties. In the first of these the record of the judgment showed that neither of the parties was a resident of Utah, where it was rendered, so that the record impeached itself. It was, of course, held that the judgment was void. In each of the others it was held that, in order to show want of jurisdiction in the court rendering the judgment, it might be shown that neither of the parties resided within the state in which it was rendered, and, that being shown, it was void. In the opinion in each case language is used apparently sustaining the proposition that such would be the rule however the question of the validity of the judgment might arise. In *People v. Dawell*, Mr. Justice Cooley delivered the prevailing opinion, Mr. Chief Justice Christiancy concurring, and Mr. Justice Campbell dissenting. It was enough for the purpose of that case to decide whether the judgment was valid as against the State of residence. Whether it was valid as between the parties was not before the court; and such was the case in *Hood v. State* and *State v. Armington*. So far as the State of residence is concerned, it must be taken upon the authorities, and certainly in this State, upon the *Armington* Case, that it is not bound by a judgment divorcing two of its resident citizens, rendered by a court of another state. There are reasons why it should not be bound, however it may be between the parties which we will presently refer to.

It does not follow that the judgment is void in the third class of cases. A judgment operating on a *res* may be binding between the parties to the action without binding one not a party, but interested in the *res*. In an action for divorce the *res* upon which the judgment operates is the *status* of the parties. There are three parties interested in that,—the husband, the wife, and the State of their residence. This was in the mind of Mr. Justice Cooley in writing the opinion in the *Dawell* Case. He said: "But it is said if the parties appear in the case the question of jurisdiction is precluded. That might be so if the matter of divorce was one of private concern exclusively." "As the laws now are, there are three parties to every divorce proceeding,—the husband,



the wife, and the State; the first two parties representing their respective interests as individuals; the state concerned to guard the morals of its citizens, by taking care that neither by collusion nor otherwise shall divorce be allowed under such circumstances as to reduce marriage to a mere temporary arrangement of conscience or passion." "Such being the case, suppose we admit that the parties may be bound by their voluntary appearance in the foreign jurisdiction. How does that affect the present case? How, and in what manner, did the Indiana court obtain jurisdiction of the third party entitled to be heard in this proceeding; that is to say, of the State of Michigan?" This line of reasoning was applied by the same court in *Waldo v. Waldo*, 52 Mich. 94, (17 N. W. 710.) One question in that case was whether the plaintiff was the widow of Jerome B. Waldo, just as in this it is whether Flora Ellis is the widow of Matthew. Previous to her marriage to Jerome B. she had been married to one Carey, from whom she had obtained a divorce in Indiana, both parties appearing in the action for it. The court held the judgment could not be assailed by showing want of residence in Indiana and residence in Michigan, saying in one part of the opinion: "This State has never complained of that judgment, and neither party has objected to it." The *Dawell Case* was not referred to, and we may from both cases take the rule in that State to be that, while the State cannot be bound by its resident citizens appearing in and consenting to the jurisdiction of a court in another State in an action for divorce, the parties may so bind themselves in respect to their individual interests. In *Kinnier v. Kinnier*, 45 N. Y. 535, a private action, it was held that a judgment of divorce by the court of another State, both parties appearing in the action, could not be assailed on the question of residence. In the course of the opinion the court, Church, C. J., said: "Nor can I assent to the reason given for allowing the husband to repudiate the binding force of the judgment upon him, after voluntarily submitting himself to the jurisdiction of the court, and litigating the case upon its merits;" thus recognizing the effect of the voluntary submission upon the parties' right to question the judgment. Cases in Massachusetts, to which we are cited by appellants, are hardly of authority on the point, because

the decisions were based mainly on a statute of that State. *Ellis v. White*, 61 Iowa, 644, (17 N. W. 28,) has only bearing on one phase of this case. It was there held that a plaintiff in an action for divorce and alimony cannot question the jurisdiction of the court after accepting the benefits of the judgment.

It may seem anomalous that a judgment of divorce can be so far effectual between the parties as to extinguish all rights of property dependent on the marriage relation, without being effectual to protect them from accountability to the State for their subsequent acts. One reason why they ought not to be permitted, by going into another State and procuring a divorce, to escape accountability to the laws of their State, is that their act is a fraud upon the State, and an attempt to evade its laws, to which it in no wise consents, and it may therefore complain. But the parties do consent, and why should they be heard to complain of the consequences to them of what they have done? Why should they be permitted to escape those consequences by saying: "It is true that by false oath made by one of us, and connived at by the other, we committed a fraud in the Wisconsin court, and induced it to take cognizance of the case; but now we ask to avoid its judgment by proof of our fraud and perjury or subornation of perjury." Because we do not think it can be done the parties must, so far as their individual interests are concerned, abide by the judgment they procured that court to render; and, of course, what will bind them will bind those who claim through them, or either of them, which is the case with the appellants other than Rachel.

There were other minor questions raised by the assignments of error, but we do not see any merit in any of them.

Order affirmed.

(Opinion published 56 N. W. Rep. 1056.)

MARY J. MAXWELL *vs.* OLIN S. SCHWARTZ *et al.*

Submitted on briefs Nov. 16, 1898. Affirmed Dec. 6, 1898.

No. 8451.

**A former decision on appeal from an order held *res adjudicata*.**

*Schleuder v. Corey*, 30 Minn. 501, followed, to the effect that, upon affirmance of an order for failure to serve paper book and brief, the matter involved in the order is *res adjudicata*, and cannot be presented again on appeal from the judgment.

Appeal by A. R. Capehart, one of the defendants from a judgment of the Municipal Court of the City of St. Paul, *H. W. Cory, J.*, rendered against him and Olin S. Schwartz, April 20, 1893, for \$279.70.

On June 11, 1892, defendant Schwartz gave his promissory note to plaintiff for \$250 and interest due in thirty days. Defendant Capehart guarantied the payment of the note in writing indorsed thereon. This action was commenced August 17, 1892, against the maker and guarantor. Capehart served an answer which the Court on September 19, 1892, struck out as sham. Both defendants appealed from the order to this Court where the order was affirmed April 6, 1893, for failure of appellants to serve printed copies of the return, assignments of error and brief. Rule XI. A transcript of the judgment of this Court and its mandate were filed in the Municipal Court and on notice judgment was entered April 20, 1893, in that Court against both defendants for the amount due on the note. From that judgment defendant Capehart appeals. The return on this appeal having been made and filed, the plaintiff moved this Court on notice and affidavit of the facts, that the judgment be affirmed with three per cent damages. 1878 G. S. ch. 67, § 18.

*A. R. Capehart, pro se.*

*James Schoonmaker*, for respondent, cited *Schleuder v. Corey*, 30 Minn. 501; *Adamson v. Sundby*, 51 Minn. 460; *Tilleny v. Wolverton*, 54 Minn. 75.

GILFILLAN, C. J. In the court below an order was made striking out the answer as sham. From this order the defendants appealed to this court, and at the last April term the order was affirmed for

failure of the appellants to comply with the rule requiring the paper book and assignments of error to be served. Judgment for plaintiff having been entered in the court below, the defendants bring this appeal therefrom. The only error claimed is in making the order striking out the answer. That matter is *res adjudicata* by the former judgment of this court, and cannot be again called in question on an appeal from the judgment. *Schleuder v. Corey*, 30 Minn. 501, (16 N. W. 401.)

The judgment is affirmed, with three per cent. damages.

(Opinion published 57 N. W. Rep. 141.)

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WILLIAM H. LANG vs. EMIL FERRANT.

Argued Nov. 21, 1893. Affirmed Dec. 6, 1893.

No. 8413.

55	415
80	423

**Witness discredited without direct contradiction.**

Although there be no direct evidence contradicting the testimony of a witness, the jury are not bound to accept it as true, where it contains inherent improbabilities or contradictions, which, alone, or in connection with other circumstances in evidence, furnish a reasonable ground for concluding that the testimony is not true.

**Finding sustained by evidence.**

A finding of fact *had* sustained by the evidence.

Appeal by plaintiff, William H. Lang, from an order of the District Court of Hennepin County, *Frederick Hooker, J.*, made March 20, 1893, denying his motion for a new trial.

On August 29, 1881, plaintiff sold and conveyed to defendant, Emil Ferrant, lot four (4) in block six (6) in Oak Lake Addition to Minneapolis, subject to a mortgage for \$1,600 given by plaintiff to Mary Scott and David Crim. By a clause in the deed the grantee was to assume and pay this incumbrance. Ferrant's father made the purchase, paid the balance of the consideration and had the lot deeded to his son Emil, as a gift from him. In July, 1882, the father went to Europe and lived there most of the time thereafter until his death in 1888. The mortgage was paid July 7, 1882, and a

satisfaction executed that day by E. S. Jones, attorney in fact for the mortgagees, but it was never recorded. Jones died in 1890. Defendant claimed that his father paid the mortgage, but was unable to prove that he did. Plaintiff made no claim for interest or principal until June, 1891. He commenced this action June 18, 1892, asking to be subrogated to the rights of the mortgagees and for foreclosure. Defendant for answer denied that plaintiff paid the mortgage, and the trial Court so found and directed judgment for the defendant. Plaintiff moved for a new trial and being denied he appeals. The discussion here was upon the evidence, whether it supported this finding of the trial Court.

*F. A. Gilman*, for appellant.

*Jackson & Atwater*, for respondent.

GILFILLAN, C. J. On June 30, 1882, plaintiff conveyed to defendant, Emil Ferrant, a lot in Minneapolis, subject to a mortgage previously executed by plaintiff to secure notes made by him, which the grantee assumed and agreed to pay as part of the consideration for the conveyance.

Of course, as a basis for the right of subrogation to the lien of the mortgagee, to establish which, and to enforce the mortgage, this action is brought, it must be shown that plaintiff paid the mortgage. The court below found as a fact that he did not pay the mortgage. If he did not, it is immaterial who did, and immaterial that the court cannot find from the evidence who did.

If that finding is sustained, it is the end of the case. On the trial the plaintiff testified that he paid the mortgage, and there was no direct testimony contradicting him. "But, although there is no direct evidence contradicting the testimony of witnesses, the jury are not bound to accept it as true, where it contains inherent improbabilities or contradictions, which, alone, or in connection with other circumstances in evidence, furnish a reasonable ground for concluding that the testimony is not true." *Hawkins v. Sauby*, 48 Minn. 69, (50 N. W. 1015.)

Plaintiff's statement of the fact of payment, and how he came to make it, has an air of improbability; and taken in connection with his conduct subsequent to the alleged date of payment,—especially the fact that for nine years after that time, and until those who

would be likely to know how the fact was, were all dead, he never suggested a claim on account of it to any one against whom payment would give him a claim, and that no reasonable explanation for the delay and silence was attempted by him,—it seems almost incredible.

The finding of the court was justified by the evidence. Order affirmed.

(Opinion published 57 N. W. Rep. 140.)

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NELS E. NELSON vs. HALVOR E. FINSETH.

Argued Nov. 30, 1893. Affirmed Dec. 6, 1893.

No. 8481.

**Conduct of trial.**

A refusal to reopen the case for further evidence *had* not an abuse of discretion:

**Newly-discovered evidence.**

An affidavit *had* not to show newly-discovered evidence for the reason that the facts stated in it as such had already been established on the trial.

Appeal by plaintiff, Nels E. Nelson, from an order of the Municipal Court of the City of Minneapolis, *C. B. Elliot, J.*, made February 10, 1893, denying his motion for a new trial.

Plaintiff claimed that on January 15, 1889, he loaned to defendant, Halvor E. Finseth, \$175, which sum defendant has neglected to repay and he asked judgment for the amount with interest and costs. Defendant answered that on November 1, 1888, he and Lewis Larson were partners in the retail milk business in Minneapolis and that plaintiff bought Larson's interest in the business and assumed to pay one half of the firm indebtedness, that plaintiff and defendant then became partners, and plaintiff agreed to put into the business \$300, that he put in this \$175, but no more, that their partnership was dissolved on February 1, 1889, when plaintiff retired and left the business in the hands of defendant and that no settlement of their partnership accounts had been made. On the trial September 12, 1892, defendant introduced in evidence their partnership account-

books showing that the firm had credited plaintiff with the \$175 on his account with it. Before adjournment that evening both parties announced to the Court that their evidence was closed, except that plaintiff should introduce the evidence of Winfield W. Bardwell. The next morning Bardwell's evidence was given. Then plaintiff asked permission to introduce William H. Donaldson as a witness to prove, as an expert bookkeeper, his opinion that the books had been altered and this entry made since the dissolution. The Court denied the request; saying, "Your evidence was closed yesterday. I can judge of the books as well as Donaldson. They are in evidence." The plaintiff excepted.

Findings were made and judgment ordered that plaintiff take nothing by his action. A case was made and filed containing all the evidence given and exceptions taken on the trial. On it and on affidavits of his attorney and of Donaldson and himself, plaintiff made a motion for a new trial on the ground of surprise at the trial that such entry appeared in the account books, and because of the refusal of the Court to receive Donaldson's testimony. This motion was refused and plaintiff appeals.

*George H. Benton and J. M. Burlingame, for appellant.*

As to surprise they cited *Nudd v. Home Ins. B. Co. of Texas*, 25 Minn. 100; *Farnham v. Jones*, 32 Minn. 7; *Russell v. Reed*, 32 Minn. 45.

*Peterson & Kolliner, for respondent.*

As to the admission of expert evidence, they cited *Freeberg v. St. Paul Plow Works*, 48 Minn. 99.

GILFILLAN, C. J. When on a trial the parties close their evidence, it is ordinarily in the sound discretion of the court to permit or refuse to permit them to reopen the case for further evidence. We see no reason to suppose the court abused that discretion in this instance. The book to impeach which the plaintiff desired to reopen his case for further evidence was introduced on the 12th, after it had been verified by the oath of the defendant, and the plaintiff testified in impeachment of it as to the entry to prove which it was offered. The suspicious indications in the book were open to an

ordinary inspection of it. If the plaintiff desired to introduce further evidence to impeach it, he ought, when on the 12th it was agreed that the evidence was closed except as to one witness, (Bardwell,) and the cause was continued to the next day, to have reserved the right or asked permission to introduce further evidence in impeachment of the book. Having rested without doing so, it was not abuse of discretion in the court to refuse to reopen the case.

There was no newly-discovered evidence. Every fact set forth as such in the affidavits offered appeared from the book, and was already proved by it. The inference to be drawn from those facts, that they did or not show the book to have been mutilated, and the entry relied on by defendant to be false, was for the court, and not for any witness.

Order affirmed.

(Opinion published 57 N. W. Rep. 141.)

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GEORGE H. FLETCHER *vs.* JOHN F. BYERS *et al.*

Submitted on briefs Nov. 24, 1893. Affirmed Dec. 6, 1893.

No. 8410.

**Sham answer.**

An order striking out an answer as sham sustained.

Appeal by defendants, John F. Byers, Frank W. Cook and Edwin Clark, from an order of the District Court of Hennepin County, *Seagrave Smith, J.*, made March 11, 1893, striking out their answer as sham.

The State Bank of Minneapolis commenced this action January 7, 1893, against the defendants above named and Frank Barnard upon their promissory note to him for \$2,500 dated April 7, 1892, and indorsed by him to that bank. The defendants, except Barnard, answered that the note was given without consideration and that they had no knowledge or information sufficient to form a belief as to whether or not Barnard had indorsed it to the Bank. A motion was made, on affidavits and notice, to strike out this answer as sham and for judgment. The motion was granted and defendants ap-



pealed. On July 31, 1893, the attorneys of the parties stipulated that the Bank made a general assignment June 26, 1893, of all its property to George H. Fletcher and that he be substituted as plaintiff in the action. An order was entered to this effect and the return sent up.

*George Thwing and Boardman & Boutelle, for appellants.*

To defeat a motion of this character the defendant is not bound to prove his case or disclose all the facts upon which he relies. To require him to do so would make the motion to strike out a fishing expedition to catch the other party's facts. We believe there is neither authority nor reason for holding that in such a case a defendant is bound to prove his case, or show his hand. *Kiefer v. Thomas*, 6 Abb. Pr. (N. S.) 42; *Wright v. Jewell*, 33 Minn. 505; *People v. McCumber*, 18 N. Y. 315; *Barker v. Foster*, 29 Minn. 166; *C. N. Nelson Lumber Co. v. Richardson*, 31 Minn. 267.

*Hahn & Hawley, for respondent.*

When a defendant, on a motion to strike out his defence as sham, supports it by an affidavit, stating specifically the grounds of his defence, he cannot as a general rule be deprived of the benefit of a trial in the ordinary mode. But no affidavit in this case in support of the answer states specifically the grounds of defence. Defendants confine themselves to a denial of the admissions of liability on the note, set forth in the affidavits in support of the motion. *Kuy v. Whittaker*, 44 N. Y. 565; *Smith v. Betcher*, 34 Minn. 218.

GILFILLAN, C. J. Appeal from an order striking out an answer as sham. The action is on a promissory note made by the defendants Byers, Cook, and Clark, payable to the defendant Barnard, and by him indorsed to plaintiff. The answer denied that the note was executed for a valuable consideration; alleged that it was executed without consideration; and denied knowledge or information sufficient to form a belief whether it was indorsed by Barnard to plaintiff.

On the motion as finally submitted, there were used, on the part of the plaintiff, the affidavits of two persons, one of them Barnard,

who swore that the note was indorsed by Barnard to plaintiff. In opposition on that point, one defendant made affidavit that he did not know how it was. Another made affidavit stating, on information and belief, that Barnard "hypothecated said note, with plaintiff as security, for a debt past due." Neither attempts to show any effort, by inquiry or otherwise, to ascertain the precise fact. On the point of consideration, plaintiff presented the affidavits of two persons, one of them Barnard, who swore that the note was given upon a settlement between Barnard and the defendants Byers, Cook and Clark, of Barnard's claim against them, growing out of a contract respecting stock in the Standard Menominee Brick Company; Barnard, in his affidavit, stating "that the remainder of said indebtedness, being the sum of about fifteen hundred dollars, then and there found to be due this affiant from said defendants on said settlement, was paid in cash by said defendants to affiant." In opposition on the matter of consideration, defendants used only the affidavit of Cook, who swore that "the note in question was executed for said stock, but that said Barnard failed to transfer said stock to said Byers, Cook, and Clark, as agreed." Then follows in the affidavit a long statement as to transactions subsequent to the stock contract, all of which is suggestive that the part of his affidavit above quoted is evasive; that while it may be literally true, it is not the entire truth. But his affidavit does not deny the settlement, nor that the notes were given upon it. It states: "Deponent denies that, at any settlement between said Barnard and these defendants Byers, Cook, and Clark, these defendants paid said Barnard the sum of \$1,500, or any other sum, on account of the purchase of said stock."

All the affidavits put it beyond reasonable doubt that the answer was false, and that the defendants knew it to be false.

Order affirmed.

(Opinion published 57 N. W. Rep. 139.)

**HORACE WILLISTON *et al.* vs. T. P. MATHEWS *et al.***

Argued Nov. 10, 1893. Affirmed Dec. 7, 1893.

No. 8412.

**A certain contract construed.**

M. had contracted to build an ore dock according to certain plans, and to complete the same by the 1st of May. The timbers required for the work were of peculiar and unusual dimensions, and, in order that the workmen be kept employed, it was necessary that the timber be furnished at stated times; and, as the dock had to be built in and over the water, it was necessary, to an advantageous performance of the work, that it be done while the ice remained on the water. In January, W., with knowledge of these facts, agreed to furnish M. all the timber for the work in three monthly installments, his contract containing a provision that, "in the event of his inability to furnish all or any of said timber as proposed above, he agreed to allow M. to purchase the same in the open market, and charge the necessary expense to his [W.'s] account, the same as if he himself had purchased it." *Held*, that this did not amount to a stipulation for an exclusive measure of damages in case of a breach of the contract.

Appeal by plaintiffs, Horace Williston, James Charnley, William McKinley and A. S. McKinley, from an order of the District Court of Lake County, *J. D. Ensign, J.*, made May 16, 1893, overruling their demurrer to the second counterclaim in the answer.

The defendants, T. P. Mathews and P. C. Krech of Minneapolis, entered into a contract December 31, 1891, with the defendant, the Duluth and Iron Mountain Railroad Company, to construct for it an ore dock No. 4 in Agate Bay at Two Harbors, Lake County, Minnesota, and complete the same on or before May 1, 1892. The plaintiffs afterwards on January 9, 1892, entered into a contract with Mathews and Krech to furnish for the work free on board cars at their mills in Duluth 1,347,284 feet of timber, board measure, one third by February 10, one third by March 8, and the balance by April 10, 1892. In case of their inability to furnish all or any part of the timber they agreed to allow Mathews and Krech to purchase the same in open market and to charge the necessary purchase price to plaintiff's account. Mathews and Krech agreed to pay for the timber \$15 per thousand feet, board measure. Plaintiffs furnished

the timber and were paid \$17,696.63. They filed a lien on the ore dock for the residue \$2,512.63, and brought this action to foreclose it.

The defendants, Mathews and Krech, answered and for a second counterclaim stated that plaintiffs were fully informed of the provisions of the contract with the Railroad Company; that the timber required was of peculiar and unusual dimensions; that it was necessary to have certain parts of the timber on hand at certain times in order that the work might progress without delay; that over one hundred men were necessarily employed in the work of construction; that plaintiffs failed to furnish the timber as fast as agreed; that up to and including March 8, 1892, they had furnished only 607,063 feet; that up to and including April 10, 1892, plaintiffs had furnished only 1,054,108 feet, including timber which these defendants were able to find and buy elsewhere and charge to their account; that to construct the dock advantageously and with the least cost and delay, it was necessary to do it while the ice covered the bay; that by the delay and neglect of plaintiffs in furnishing the timber, their workmen could not be constantly employed, or the work completed before the ice melted in the Spring, or before June 1, 1892; that by reason of the delay, they sustained damages to the amount of \$6,000, and they demanded judgment for the balance of this amount after deducting plaintiff's claim.

Plaintiffs demurred to this counterclaim on the ground that the provision in their contract allowing the contractors in case of delay to buy the timber in open market, limited the damages to the difference between the market and the contract prices, which difference, if any, the counterclaim did not disclose. The trial Court overruled the demurrer and the plaintiffs appeal.

*Walter Ayers*, for appellants.

The damages which ordinarily flow from a failure to deliver goods as contracted for, is the difference between the market price of the goods, and the contract price. *Liljengren F. & L. Co. v. Mead*, 42 Minn. 420.

If the contract were silent upon the question of damages, the plaintiffs might be held liable for the special damages sustained. But it is not silent. The language is, that plaintiffs will allow defendants

to buy elsewhere in case of their failure to furnish the timber at the specified time. It places a limit on what the defendants may do in case of default. It fixes one rule of damages in case of a breach. The defendants seek to apply another and additional rule involving a ruinous liability. The contract shows upon its face that a possible failure to deliver all of the materials at the times specified was contemplated by both parties, and that a purchase by the defendants in open market of the deficiency, and deduction of the cost from the contract price, was contemplated and agreed upon both as the remedy and the measure of damages. *Haydnville, M. & M. Co. v. Art Institute*, 39 Fed. Rep. 484.

*J. L. Washburn*, for respondents.

The damages pleaded in this counterclaim were fairly within the contemplation of the parties as the probable consequence of the delay and breach of the contract. The demurrer admits that the damages were sustained, and the contract evinces no intention to waive them or contract away the right to maintain an action for them. The contract does no more than to emphasize the privilege of defendants to go into the market and buy, and insures them that privilege without the plaintiffs raising any contention as to that right. It does not exclude any other remedy which by virtue of the circumstances of the case was fairly and naturally the result of a breach of the contract. *Noyes v. Phillips*, 60 N. Y. 408; *Higgins v. Delaware, L. & W. R. Co.*, 60 N. Y. 553.

**MITCHELL, J.** According to the answer, the defendants had contracted to build an ore dock at Agate bay according to certain plans and specifications, and complete the same by May 1, 1892. The timber and lumber required for the work were of peculiar and unusual dimensions. In the prosecution of the work, it was necessary to employ a large crew of men, and in order that the work might progress without delay, and the men be kept employed, it was necessary that certain parts of the timber should be on hand at certain times; and, inasmuch as the dock had to be constructed in and over the water, it was necessary, to an advantageous performance of the work, that it be done while the ice remained on the water.

The plaintiffs, with knowledge of all these facts, on January 9,

1892, agreed to furnish to defendants all the lumber and timber for the construction of the dock, in three monthly installments. But they failed to furnish a large part of it, by reason whereof the defendants were put to large expense in going and endeavoring to procure the timber elsewhere, and were also damaged by reason of their workmen being compelled to remain idle, and also by reason of the work being delayed until the ice became rotten and unfit to work on, thereby rendering it necessary for defendant to use boats and flats, at greatly increased expense.

Plaintiffs do not dispute that under this state of facts the special damages pleaded would be recoverable, as being fairly within the contemplation of the parties as the probable consequence of a breach of the contract, unless the parties have expressly stipulated for some other measure of damages. As such a stipulation, they rely on the provision in the contract that "in the event of our [plaintiffs'] inability to furnish all or any part of said timber as proposed above, we agree to allow said Mathews & Krech to purchase the same in open market, and to charge the necessary expense to our account, the same as if we ourselves had purchased said timber." It is claimed that this language is restrictive, and limits the damages, in case of a breach of the contract, to the difference between the contract price and what defendants might have to pay for the timber in the market. We do not think that it can be held that the parties intended this provision to go to that length. We recognize the right of parties, if they see fit, to stipulate for a different measure of damages for the breach of a contract from that which the law would give. We also recognize the difference between contracts where the law furnishes a definite and fixed standard for measuring damages for their breach, and those of such a character that the damages which must result from a breach are uncertain in their nature, and not susceptible of proof by any fixed pecuniary standard; and we are aware that stipulations for a liquidation of damages should receive more favorable consideration in the latter class of cases than in the former. But, even in the latter, we think that, before a provision in the contract can be given the effect of a stipulation fixing a measure of damages either greater or less than the law would give, it must fairly appear from its language, construed in the light of the nature of the contract and the situation of the

parties, that they intended it to have that effect. No such result should be arrived at by mere doubtful inference. While, independently of any express provision to that effect, it would have been the right, as well as duty, of defendants, in case of plaintiffs' default, to procure the timber elsewhere, if obtainable in the market, yet, as laymen, the parties may not have understood this, and might well have inserted this provision in their contract from abundant caution, without having in mind, or at all intending, that it would or should operate as a stipulation for an exclusive measure of damages in case of a breach of the contract.

We do not think the case is one for the application of the maxim that the expression of one thing is the exclusion of another. That maxim is not of universal application, but depends upon the intention of the parties, as discoverable upon the face of the instrument or of the transaction. Order affirmed.

(Opinion published 56 N. W. Rep. 1112.)

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GEORGE B. CRUMMEY *vs.* SAMUEL W. RAUDENBUSH.

Argued Nov. 10, 1898. Affirmed Dec. 7, 1898.

No. 8344.

**Detention of chattel sold on credit to one discovered to be insolvent.**

Where the vendor has contracted to sell personal property on credit, if, before payment, and while he still retains possession of the property, he discovers that the vendee is insolvent, he may hold the goods as security for the price.

**"Insolvent" defined.**

"Insolvent," as used in this connection, means merely a general inability to pay one's debts.

**Omission to state insolvency as reason for detention does not waive the right.**

Where the vendor refuses to deliver the property to the vendee until the purchase money is paid or secured, the fact that he does not specifically assign the insolvency of the vendee as the ground of his refusal does not

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amount to a waiver of his lien, and will not estop him from asserting it as a defense to an action for damages for refusing to deliver the goods.

**Findings supported by the evidence.**

Evidence *held* to justify a finding that plaintiff was insolvent.

Appeal by plaintiff, George B. Crummey, from an order of the Municipal Court of the City of St. Paul, *H. W. Cory, J.*, made June 29, 1893, denying his motion for a new trial.

This action was brought to recover \$225 damages for breach of a contract, of which the following is a copy;

St. Paul, April 2, 1889.

Received of George B. Crummey one Schumacher square piano at \$225.00 in part pay for No. 3 Schumacher upright piano in walnut, mahogany or ebony, at \$500.00, balance \$275.00, to be paid at \$50.00 per quarter, from date of delivery of upright piano—8 per cent. per annum.

S. W. RAUDENBUSH.

Defendant answered that he was and ever had been ready and willing to deliver the new upright piano on receiving the \$275. He alleged that he had learned that plaintiff was insolvent and he claimed the right to retain the piano until paid the balance of the price. The trial Court sustained this defence and directed judgment that plaintiff take nothing by this action. He moved for a new trial, and being denied appeals.

*James E. Markham*, for appellant.

There was no evidence offered on the trial reasonably tending to show that the plaintiff was, either at the time of the trial or at any time after the making of the contract, in fact insolvent. *Nininger v. Knox*, 8 Minn. 140.

*O. H. Hubbard*, for respondent, cited *Pardee v. Kanady*, 100 N. Y. 121; *Arnold v. Delano*, 4 Cush. 33; *Ex parte Chalmers*, L. R. 8 Ch. App. 289.

MITCHELL, J. Stated according to its legal effect, the contract, upon which this action was brought, was an executory one for the sale of a piano by defendant to plaintiff, a part of the price being



paid at the date of the contract, and the balance to be paid in quarterly installments from and after the date of the delivery of the piano. The action is for damages for a refusal to supply the piano according to the contract. It is not alleged that the balance of the price has ever been paid or tendered, the plaintiff standing on the terms of the contract that it was to be furnished on credit. Much of the answer consists of entirely irrelevant matters, the only defense alleged being that since the making of the contract the plaintiff had become, and still is, insolvent, and the only important question in the case is whether the defendant has established a defense justifying his refusal to deliver the piano on that ground.

Where a vendor contracts to sell personal property on credit, he thereby agrees to waive his lien for the purchase money; but he does so on the implied condition that the vendee shall keep his credit good. If, therefore, before payment, and while the vendor still retains possession of the property, he discovers that the vendee is insolvent, he may hold the goods as security for the price. The insolvency of the vendee does not rescind the contract, and is not of itself a ground for rescission. It merely entitles the vendor to demand payment in cash before parting with possession of the property. Courts have differed as to the name to be given to this right, but they all recognize its existence. Like the analogous right of stoppage *in transitu*, it grows out of the vendor's original ownership and dominion, and is founded on the equitable principle that one man's property ought not to go to pay another man's debt. The right is not limited to cases where the insolvency of the vendee occurred after the date of the contract, but exists also even where the insolvency existed at that time, but was not discovered by the vendor until afterwards; and, as the presumption of both reason and law is that, where a vendor sold goods on credit, he believed that the purchaser was solvent and able to pay, the burden is on the vendee to prove that the vendor had knowledge of the insolvency at the time, and entered into the contract with that knowledge. The right is not affected by the fact that part of the price has been paid; and it makes no difference whether the sale was of a specific article appropriated to the contract, or, as in this case, a contract to supply an article of a certain description. The term "insolvent" is not used in any technical sense. It is not necessary that the vendee

should have been adjudged a bankrupt or insolvent, or have made an assignment of his property. Insolvency, as applied to this branch of law, means a general inability to pay one's debts or to meet one's financial engagements. Passing to the facts of this case, an examination of the evidence satisfies us that it amply justified the trial court in finding that the plaintiff was insolvent in the fullest sense of the term. It follows that defendant had a right to refuse to deliver the property without payment in full of the price, provided he properly asserted that right, and had not in some way waived it.

The contract was made in April, 1889. The evidence is practically undisputed that for some two years afterwards the defendant was not only able and ready to furnish the piano, but repeatedly urged the plaintiff to come and select an instrument, but that he failed to do so, giving as a reason his inability to meet the payments. Finally, in the winter or early spring of 1893, after defendant had ceased to represent that make of piano in the trade, and hence no longer kept it in stock, the plaintiff for the first time formally demanded the delivery of the instrument within a specified time. Failing in some efforts to induce plaintiff to accept a piano of another kind, the defendant required some assurance that, if he procured a piano of the kind called for by the contract, the plaintiff would be ready to pay for it in cash, or give a mortgage on the instrument to secure the purchase price. The plaintiff positively refused to agree to do either, and insisted on the terms of the original contract for the delivery of the property on credit, which defendant as positively refused to do.

The evidence would fully justify the conclusion that the defendant was always willing to furnish the piano if plaintiff would pay the price in cash, or secure it by mortgage on the property, and that his refusal merely went to the extent of refusing to furnish it on credit without security.

But at no time during the negotiations did defendant assign the insolvency of the plaintiff as his reason for demanding cash or security, or give any special reason for doing so, except that when demanding the mortgage he said it was the custom of the trade. On this ground plaintiff's counsel invoke the doctrine that if a person, when called upon to deliver, places his right to retain the goods upon a ground inconsistent with a claim by virtue of a specific lien, this

is a waiver of the lien; and that on the trial he will not be permitted to rest his refusal on a different and distinct ground from that on which he claimed to retain the property at the time of the demand. An examination of the authorities on the subject, from the early case of *Boardman v. Sill*, 1 Camp. 410, down, satisfies us that they all proceed upon principles essentially of equitable estoppel, and limit the application of the doctrine invoked by counsel to cases where the refusal to deliver the property was put on grounds inconsistent with the existence of a lien, or on grounds entirely independent of it, without mentioning a lien. Thus it has been repeatedly held that a lien is not waived by mere omission to assert it as the ground of refusal, or by a general refusal to surrender the goods, without specifying the ground of it, except in certain cases, where the lien was unknown to the person making the demand, and that fact was known to the person on whom the demand was made. In such cases, if the ground of the refusal is one that can be removed, the other party ought in fairness to have an opportunity to do so. But no such state of facts exists in this case. While defendant did not specify his vendor's lien by reason of plaintiff's insolvency as the ground of his refusal, yet he never placed his refusal on any ground inconsistent with or independent of it. On the contrary, from first to last, what he insisted on was payment of, or security for, the price of the property; and the ground of his refusal was the refusal of plaintiff to give either. True, at the last, he announced his positive refusal to furnish the piano unless plaintiff would agree to give a chattel mortgage on it,—a thing which he had no legal right to insist on; but it is very evident that this demand on defendant's part was merely an alternative for payment in cash, which he had a right to demand, but which plaintiff had refused. The plaintiff probably had a right to be informed, as he was, that the property was held for the purchase money, for that was a matter which he could remedy by payment, but it would have availed him nothing to be informed that defendant's right to retain the property for the price was based on his insolvency, for that was a fact which he could not have changed. We can see nothing in defendant's acts of omission or commission that amounted to a waiver of his title, or which should estop him from now asserting it.

The rulings of the trial court on the admissibility of evidence as

to plaintiff's insolvency were not always correct, or even consistent; but the only error of which plaintiff could complain is that, in one instance, the defendant was allowed to give his opinion that plaintiff was insolvent.

We think, however, that this was error without prejudice, for the reason that the other evidence, such as plaintiff's own admission of inability to pay; the inability of others, after search and inquiry, to find any property belonging to him; and that he was not in any business in this state, of which he had practically ceased to be a resident,—was such as, in the absence of any rebutting evidence, to require a finding that he was insolvent.

Order affirmed.

(Opinion published 56 N. W. Rep. 1113.)

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DANIEL L. BELL vs. WILLIAM FORRESTAL et al.

Argued Nov. 15, 1893. Reversed Dec. 7, 1893.

No. 3554.

**Sureties released by extension of time of payment.**

D. and others were liable as sureties for an indebtedness on account due and payable from F. to B. As collateral security for part of the account, B. accepted from F. the joint negotiable promissory note of F. and a third person, payable in sixty days, which, without the knowledge or consent of the sureties, and without any express authority from F., he immediately indorsed and sold, realizing the money on it, which he credited on F.'s account. But, the note not having been paid at maturity by the makers, B., as indorser, was compelled to take it up.

Held, that the sureties were released to the extent of the amount of the note, because the act of B. in disposing of the note operated, at least, as a conditional payment on the account, which suspended all right of action on it, to that amount, until the maturity of the note, and until B., as indorser, had taken it up.

Appeal by defendants, James G. Donnelly, George Mitsch and Terrence Kenny, from an order of the District Court of Ramsey County, *William Louis Kelly, J.*, made March 20, 1893, denying their motion for a new trial.

The defendants, William Forrestal and James Forrestal, contracted with the City of St. Paul to construct certain sewers in University Avenue and other streets in the western part of that city. The other defendants were sureties on their bond to the City for \$107,000 dated October 31, 1889, conditioned that if the Forrestals should pay all just claims for work done and materials furnished and perform the contract, the bond should be void, otherwise of force. The plaintiff, Daniel L. Bell, sold them cement used in the work to the value of \$7,628.15 and claimed a balance unpaid of \$6,151.95 and brought this action on the bond to recover that amount. The sureties answered that on June 24, 1890, plaintiff was paid \$2,500 by check on Germania Bank. They further answered that plaintiff, without their knowledge or consent, extended the time of payment by a valid agreement with the Forrestals, whereby the sureties were released. The evidence showed that on August 18, 1890, Forrestal Bros. gave plaintiff their promissory note for \$2,500 payable sixty days thereafter. That he on the same day indorsed it and had it discounted at the Bank of Minnesota and gave the Forrestals credit for the money. When the note fell due it was not paid, but was protested and notice given him, and he paid it and charged the Forrestals with the amount. The issues were tried December 16, 1892. The jury returned a verdict for the plaintiff and assessed his damages at the full amount he claimed with interest. The sureties moved for a new trial, but were refused and they appeal.

*John B. & E. P. Sanborn and Stevens, O'Brien & Glenn, for appellants.*

Whatever the agreement of the parties was, the act of discounting the note placed it beyond the control of Bell and thereby discharged the sureties to that extent; because, while he was unable to surrender the note, he could not recover against the Forrestals on his account.

If the agreement between the parties was that the note should be taken as collateral, then the discounting of it was a conversion by the plaintiff and his sureties are discharged *pro tanto*. *Wheaton v. Wheeler*, 27 Minn. 464; *Brandt, Surety*, § 345; *Mayhew v. Boyd*, 5 Md. 102.

*McLaughlin & Morrison*, for respondent.

The note, not having been received as payment nor as evidence of the account, did not operate directly upon it, and it being the note of the debtor, it was simply accommodation paper. The time for the payment of the account was not extended. The contrary was expressly agreed. The right to proceed against the surety was expressly reserved, therefore, there was no consideration for the paper. *Shaw v. First A. R. P. Church*, 39 Pa. St. 226; *Morse v. Huntington*, 40 Vt. 488.

The discounting of the note at the Bank did not, in legal effect, release the sureties. *Weller v. Ransom*, 34 Mo. 362; *Wyke v. Rogers*, 1 De Gex, MacN. & G. 408; *Frisbie v. Larned*, 21 Wend. 449; *Fellows v. Prentiss*, 3 Denio, 512; *Hutchinson v. Moody*, 18 Me. 393.

When the right to proceed against the surety is reserved the surety is not released, even if time was given the principal debtor. *Claggett v. Salmon*, 5 Gill & J. 314; *Jones v. Sarchett*, 61 Ia. 520; *Calvo v. Davies*, 73 N. Y. 211; *National Bank of N. v. Bigler*, 83 N. Y. 51.

MITCHELL, J. Upon entering into a contract with the city of St. Paul for the construction of a sewer, the defendant Forrestal, the contractor, as principal, and the other defendants as sureties, executed a bond to the city in accordance with the provisions of Sp. Laws 1889, ch. 360, which inured to the benefit of all who performed work or furnished material in the execution of the contract. *Sepp v. McCann*, 47 Minn. 364, (50 N. W. 246.) This is an action on the bond to recover for material furnished by plaintiff to the defendant Forrestal in the execution of the contract.

The only matters in issue were—*First*, how much had been paid on the claim by Forrestal; and, *Second*, whether certain acts of the plaintiff had not, in part, released the sureties from their liability on the bond.

1. It appeared that, when Forrestal made a certain payment to plaintiff, he was also indebted to the latter for other material furnished in the execution of another contract with the city. The defendants claim that this payment was made generally on all of Forrestal's indebtedness to plaintiff, as one indivisible account, and should be so applied, while plaintiff's contention is that the payment

was made and accepted under an express agreement of the parties that it should be first applied to pay in full the amount due for material for the other job, and the remainder only applied on the indebtedness for material for this sewer. All we need say on this branch of the case is that in our opinion, on the evidence, the question was one for the jury, and that their verdict in favor of the plaintiff is conclusive.

2. The partial release of the sureties is claimed to have been effected by the following facts: After most of the indebtedness now sought to be recovered had become due and payable, plaintiff applied to Forrestal for payment. Forrestal, having no money, requested plaintiff to accept a promissory note. After some negotiations on the subject, plaintiff accepted a negotiable promissory note for \$2,500, payable in sixty days, with eight per cent. interest, executed by Forrestal Bros., a copartnership composed of defendant Forrestal and his brother. Plaintiff immediately indorsed, sold, and transferred it to a bank, and obtained the money on it, which he credited on his books to Forrestal's account, which credit appeared on subsequent monthly statements of account rendered by plaintiff to Forrestal, showing the balance due after deducting the credit of \$2,500. The record is entirely silent as to the subsequent history or present condition of this note, except that plaintiff's books of account show that, at or about the date of the maturity, he charged it back to Forrestal, by debiting his account with the amount. We shall, however, assume what the record does not show,—that plaintiff, as indorser, had to take up the note. The testimony of Forrestal and of plaintiff is conflicting as to the terms and conditions upon which the note was given and accepted. Forrestal's testimony was that it was given and received as payment, or conditional payment, of part of the book account, without anything being said as to its effect either upon the account or upon the bond; and certainly all of plaintiff's subsequent acts tend strongly to corroborate this. On the other hand, plaintiff (corroborated by his brother) testified that he accepted it on the express condition that it should not extend the time of payment of the account, or affect his remedy on the bond against the sureties. Plaintiff and his brother are quite confused in their testimony as to the purpose for which the note was given. They sometimes speak of it as

having been given "merely as a matter of accommodation, and not as payment;" again, as "collateral or as an accommodation;" and, still again, as being accepted merely "as collateral."

Of course, if it was given and accepted merely as accommodation paper, without any reference to or connection with the account due from Forrestal to plaintiff, it needs no argument to show that it is wholly immaterial what plaintiff did with it, as it could not affect the liability of the sureties on the bond. But it is evident that the witness inaccurately used the word "accommodation" as synonymous with "collateral,"—a meaning which the court itself adopted from the witnesses, in its charge to the jury. But, when brought down to state the exact terms of the agreement, plaintiff testified that Forrestal requested him to accept the note as collateral, and that he accepted it as collateral, and not as payment on the account, but with an express agreement that it should not extend the time of payment of the account, or in any way affect or suspend his remedy against the sureties on the bond. And the tenor of the entire evidence, both direct and circumstantial, conclusively negatives the idea that the note was given merely as accommodation paper, without reference to the account. The only two views which the evidence reasonably tends to support are either that it was taken as a conditional payment, with an implied extension of time of payment of that much of the account until the maturity of the note, or that it was taken merely as collateral security for the account.

In our opinion the evidence would justify the jury in adopting the latter view, which is the one most favorable to the plaintiff. Accepting this to have been the agreement, as we must, in favor of the correctness of the verdict, it is very clear that the mere acceptance of the note as collateral would not release the sureties. But we are of opinion that the subsequent act of the plaintiff in parting with the note, and transferring it to the bank, did have that effect, for the reason that it operated, if not as an absolute payment on the account, at least as a conditional one, which suspended all right of action on that much of the account until the maturity of the note, and until plaintiff, if held liable as indorser, had been compelled to take it up. Whether the transfer of this collateral note, without an express agreement that this might be done, amounted to a wrongful



conversion, it is not necessary to inquire. It is enough that plaintiff, by doing so, had realized the money on the note, and his only liability on it was as indorser, which was contingent on the maker's failure to pay at maturity, and on the holder's taking the steps to charge him as indorser, neither of which contingencies might ever occur. While matters stood thus, the plaintiff had no right of action on the account, except for the remainder after deducting the amount of the note. The effect of this was, on well-recognized principles, to release the sureties *pro tanto*; and, if once released, no subsequent act of plaintiff would revive the liability.

Cause remanded, with directions to the district court to reduce the verdict by the amount of the note, on the basis of crediting on the account \$2,500 as of the date of the note,—August 18, 1890.

(Opinion published 57 N. W. Rep. 55.)

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An application for reargument was denied January 2, 1894, and the following opinion filed:

**PER CURIAM.** On motion for reargument, our attention is called to the fact that plaintiff furnished the material to Forrestal Bros., who performed the work under James Forrestal's contract with the city. On further examination of the record, we find that this is so, and that we were misled on that point by the briefs of counsel. But this does not at all affect the decision of the case. We did not decide, as counsel seems to suppose, that the sureties were released because of the disposition by plaintiff of collateral securities to which they would have been entitled to be subrogated on payment of the debt. Neither did we hold that the sureties were released by plaintiff's acceptance of the note, especially in view of the fact that in doing so he reserved, as he claims, his right to proceed against the sureties. But what we did hold had that effect was plaintiff's disposing of the note, thereby disabling himself, at least for the time being, from suing the Forrestals on the original debt. The application for a reargument is therefore denied.

(Opinion published 57 N. W. Rep. 223.)

## JAMES A. FAGAN vs. PEOPLE'S SAVINGS &amp; LOAN ASSOCIATION.

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Argued Nov. 20, 1893. Affirmed Dec. 7, 1893.

No. 8441.

**Mortgage construed.**

A certain mortgage, executed by a borrowing member to a so-called "building association," construed, and *held* not to be security for "dues" or "subscriptions" on stock.

**Disposition of surplus proceeds of sale, on foreclosure.**

Where a mortgagee forecloses under a power of sale, and in his notice claims as due an amount greater than is allowed by the terms of the mortgage, and bids in the property for that amount, he is liable to the mortgagor or his assigns for the excess; following former decisions. Where land, which is subject to two mortgages, is sold on the first, the lien of the second is transferred from the land to the surplus of the proceeds of sale after satisfying the first mortgage; and the second mortgagee is entitled to such surplus to the extent necessary to satisfy his mortgage, although by its terms his debt is not yet due.

Appeal by defendant, the People's Savings and Loan Association, from an order of the District Court of Hennepin County, *Seagrave Smith, J.*, made March 13, 1893, denying its motion for a new trial.

On March 14, 1890, Dora Hogan mortgaged to the People's Building and Loan Association of Minneapolis, her property in that city near the corner of Third Street and Eighth Avenue South, to secure the performance of her contract with it. She afterwards on March 21, 1890, gave a second mortgage on the same property to the plaintiff, James A. Fagan, to secure the payment of her note to him for \$1,250 and interest due three years thereafter. The name of defendant was subsequently changed to People's Savings & Loan Association and it foreclosed its mortgage June 22, 1891, by sale of the property under a power in the mortgage pursuant to 1878 G. S. ch. 81. The defendant bid in the property at the sale for \$18,606.90. The notice of sale was dated May 8, 1891, and stated there was then claimed to be due \$18,382.10. The costs and expenses of the sale including \$200 attorneys fees were \$224.75. Plaintiff claimed that the sum for which the property sold exceeded the amount due to the defendant by \$1,250, and he brought this action August 1, 1892, to recover this surplus. The issues were tried February 13, 1893, and,

by direction of the Judge, the jury returned a verdict for plaintiff for \$893.77 with interest on that sum from the day of the foreclosure sale. The defendant moved for a new trial. Being denied, it appeals.

*Charles M. Cooley and Charles G. Van Wert, for appellant.*

*F. B. Wright and Brooks & Hendrix, for respondent.*

MITCHELL, J. Dora Haugen executed to defendant (then called the People's Building & Loan Association) a first mortgage on certain real estate, and then executed a second mortgage on the same property to the plaintiff. Default having been made in the conditions of the first mortgage, defendant sold the premises under a power, itself being the purchaser at the sale. Plaintiff brought this action to recover an alleged surplus of the proceeds of sale over and above the amount due on defendant's mortgage, claiming that he is entitled to the same as second mortgagee.

1. The first question is whether there was any "surplus"; that is, whether the amount bid by the defendant exceeded the amount due on its mortgage. The defendant is a corporation organized under 1878 G. S. ch. 34, title 2, and claims to be a "building association;" but its articles of association and by-laws disclose that, while it has adopted some of the features of building associations, it is rather what its present name indicates,—a savings and loan association. As the question how much was due to the defendant must be settled by the terms of the mortgage itself, there being nothing in the articles of association or by-laws which, by being referred to in the mortgage, affects its construction, it is not necessary to refer to either the articles or the by-laws, except two or three provisions of the latter, which may throw light on the meaning of some of the provisions of the mortgage.

The by-laws provide that each shareholder in class one (1) shall pay fifty eight (58) cents each month on each share of stock owned by him until such share shall mature, or arrive at the par value of \$100; also that if he shall be in default in the payment of any of these installments for more than three days, he shall pay a certain specified fine on each share for every month thereafter while thus in default. They also provide that any shareholder borrowing money from the association shall give his non-negotiable note for the same,

secured by mortgage, and shall until his loan is repaid, or his stock matures, pay, in addition to the monthly installments on his stock, a monthly premium of the number of cents per share bid by him on each share for his loan, and interest on the loan at six per cent. per annum. They also provide that any borrowing shareholder may at any time, when not in default, on thirty days' notice, release his mortgage by repaying his loan and the expense of satisfying the mortgage.

Mrs. Haugen, being the owner of 150 shares of stock of the association of class 1, of the "par" or "paid-up" value of \$15,000, made a loan of the association of \$15,000, and executed a contract, of which the following are the material provisions:

"Received of the People's Building and Loan Association, \$15,000, as a loan on 150 shares of stock owned by me in said association. And I agree to pay to said association on the 14th day of each month \$274.00, which shall be applied as follows: *First.* To the payment of any fines or other assessments made against me in pursuance of the by-laws of the association. *Second.* To the payment of the premiums for preference due on said loan, amounting to \$112.50 per month. *Third.* To the payment of the interest due on said loan, amounting to \$75 per month. *Fourth.* The balance of said payments shall be credited as dues on said stock. Said payments shall be continued until the dues credited on said stock, together with the dividends thereon, shall equal the amount of the loan. Should I fail for six months to pay said monthly payments, then the whole amount of said loan shall, at the option of said association, at once become due and payable."

Haugen also executed to the association the mortgage referred to, the conditions of which, after setting out the contract, were that, if default should be made in the payment of said sums, or any part thereof, at the time and manner specified in the contract, the association was authorized to sell the mortgaged premises at auction, "and out of the moneys arising from such sale to retain the principal, interest, and premiums which shall then be due on said contract, and all fines and penalties due and payable in accordance with the by-laws of said association, \* \* \* and pay the surplus, if any, to the mortgagor, her heirs, representatives, or assigns."

In determining how much was due on the mortgage at the date

of the foreclosure sale, of course the question is, what was it security for? and upon this it seems to us that the controlling provision of the mortgage is the one last quoted,—as to what the mortgagee was authorized to retain out of the proceeds of sale. The controversy in the case is as to whether the mortgage was security for the monthly “dues” of 58 cents per share on the stock. It seems to us that the express terms of the mortgage conclusively settle this in the negative. All that the mortgagee was authorized to retain out of the proceeds of sale were the principal, interest, and premiums then due, and all fines and penalties due and payable according to the by-laws. “Dues” or “subscriptions” on the stock are not included.

Originally and legitimately a “loan” by a building association to a member was merely an advanced payment to him of the par or mature value of his stock. No repayment of the “loan” was provided for or anticipated, and the mortgage was merely security for (1) the payment of stock “dues” during the existence of the association, or of that particular series of stock, which, if paid, would raise the value of the stock to an amount equal to the sum advanced; (2) interest on the advance during the interval between the date of the advance and the maturity of the stock, the “premium” or “bonus” bid by the advanced member being usually taken out of the “advance.” Under such a mortgage the “principal” secured would be the stock “dues,” and, in case of default on part of the mortgagor, the amount presently due on the mortgage, aside from interest on the advance, would be the amount of stock dues, not merely to the date of sale, but up to the expiration of the duration of the association or of that particular series of stock. The reasons why the mortgage should so provide in such a case are quite manifest. The “borrowing” member having been paid the matured value of his stock in advance, and there being no provisions for the repayment of this “advance,” it is quite evident that to protect the association it should have security for the payment of stock “dues” up to the date of the maturity of the stock; for it is the payment of these dues which is relied on to ultimately raise the value of the stock so as to equal the sum advanced.

But no such reasons existed in the present case, and the mortgage is entirely different in its provisions. In case of a default on part of the mortgagor, the association on foreclosure obtains repay-

ment of the principal sum loaned, and all interest and premiums (which is but another name for interest) up to the time of sale, together with all fines and penalties then due the association.

No reason exists, in the nature of things, why, under such circumstances, a borrowing member shall give security for the payment of stock "dues" or "subscriptions," any more than a nonborrowing member. The same may be said of "fines" and "penalties," but it is enough that as to them the mortgage so provides.

The mistake of some writers on this subject is that they start out having in mind what a building association "loan" originally was, and what a mortgage, in such a case, secured, and then interpolate the same terms into all modern so-called "building association mortgages," regardless of the terms of the contract. But in every case the question is not, what contracts did such associations once make? or, what legitimately ought to be the provisions of such contract? but, what contract have the parties in fact made? The mortgage in this case not being security for "dues," and the defendant having no right to retain them out of the proceeds of the sale of the premises, it follows that the amount bid at the sale was in excess of the amount due on the mortgage according to its terms in a sum equal to the amount of the verdict.

2. Relying on a line of decisions commencing with *Bidwell v. Whitney*, 4 Minn. 76, and on *Dickerson v. Hayes*, 26 Minn. 100, (1 N. W. 834,) it is contended that plaintiff, having, without objection, suffered a sale by foreclosure for the amount claimed in the notice, cannot now recover the alleged surplus; that he should have enjoined the sale. But we have repeatedly explained, and especially in *Seiler v. Wilber*, 29 Minn. 307, (13 N. W. 136,) that these cases have no application to a case like the present.

The doctrine of *Bidwell v. Whitney*, and of cases following it, only applies where the amount claimed to be due is according to the express terms of the contract, although more than the law would enforce. The basis of these decisions is that, if a man expressly agrees to pay more than the law will enforce against him, he may, if he chooses, abide by the terms of the contract, and that he does so by remaining silent while the other party is enforcing the contract according to its terms. *Dickerson v. Hayes* merely holds that where the party is asking equitable relief by setting aside the sale,

or by allowing him to redeem by paying less than the amount bid, he must show an excuse for not enjoining the sale.

But we have invariably sustained the right of the mortgagor or his assigns to recover the amount bid, although claimed in the notice, in excess of the amount due on the mortgage according to its terms. *Bennett v. Healey*, 6 Minn. 240; *Bailey v. Merritt*, 7 Minn. 159; *Spottswood v. Herrick*, 22 Minn. 548; *Seiler v. Wilber*, *supra*.

In such a case the mortgagee's only escape from liability for the excess is to show some ground, such as excusable mistake, entitling him to equitable relief by having the sale set aside, and a new foreclosure ordered. See *Lane v. Holmes*, *ante*, p. 379, (57 N. W. 132.)

3. It is further contended that plaintiff is not entitled to recover this surplus, because, by its terms, the debt secured by his mortgage is not yet due. But he is not suing on the debt, but to recover the proceeds of his mortgage security. When land is sold on a first mortgage, which is subject to a subsequent lien, the lien is transferred from the land to the surplus money. The proceeds of the sale, after satisfying the first mortgage, stand in place of the equity of redemption to those who had title to or lien upon it. The right to this surplus passes to the grantee or assignee of the mortgagor by a conveyance of or mortgage upon the equity of redemption; and the court will always direct the application of the money according to the rights of the parties as they existed previous to the alteration of the estate. In case of future installments to become due on the first mortgage; or, in case of a second mortgage, not due, the mortgagees would be entitled to the surplus to the extent necessary to pay their mortgages in full. If the debt was on interest, that would be saved; if not on interest, a deduction would be made by way of rebate of interest. Our statute, (1878 G. S. ch. 81, § 4,) which is but declaratory of what the law has always been, expressly provides for this being done in case of future installments on the same mortgage. But the principle is the same in the case of second mortgages. *Barber v. Cury*, 11 Barb. 549.

Although not necessary, perhaps the safer practice in such cases is for the second mortgagee to join the owner of the equity of redemption as a party defendant. Undoubtedly such owner might

intervene, and in a proper case the defendant holding the surplus might require him to be interpleaded. But no such question is involved in this case.

It can hardly be necessary to say in conclusion that it does not concern defendant whether plaintiff's mortgage was without consideration or not, and hence that the court was right in excluding evidence as to the fact.

Order affirmed.

(Opinion published 57 N. W. Rep. 142.)

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HORATIO HOULTON vs. JOSEPH GALLOW.

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Submitted on briefs Nov. 21, 1893. Affirmed Dec. 7, 1893.

No. 8567.

**Motion to set aside the service is not a waiver of defect in the service.**

By appearing and moving to set aside the service of a summons on the ground that the complaint was not filed, and no copy of it served with the summons, a party does not waive the irregularity in the service, although he does not expressly state that his appearance is special, and limited to the purposes of the motion.

**Service of summons set aside.**

*Held*, also, that in this case there was no error in setting aside the service of the summons.

Appeal by plaintiff, Horatio Holton, from an order of the District Court of Wright County, *Seagrave Smith, J.*, made May 8, 1893, setting aside the service of the summons in the action.

By his complaint the plaintiff claimed that he was an explorer of lands in Northern Wisconsin and at the request of defendant, Joseph Gallow, imparted to him much valuable information regarding pine timber on the land belonging to the United States. That defendant was thereby enabled to and did select, settle upon and purchase a quarter section of the public lands having much valuable pine timber upon it. That defendant promised to pay plaintiff for his said services and information what they were reasonably



worth. That they were worth \$1,000 for which sum he demanded judgment.

The summons was served upon defendant personally on April 24, 1893, at Minneapolis. No copy of the complaint was served. The original complaint was prepared and verified at Duluth on April 25, and mailed to the Clerk of the Court at Buffalo, the County Seat, where it was received and filed on April 26. Defendant moved the Court on notice and affidavits to have the service set aside and the action dismissed on the ground that no complaint was on file when the summons was served. The Court granted the motion and plaintiff appeals.

*Spencer & Alford*, for appellant.

Plaintiff admits that the failure to file the complaint was an irregularity, but defendant waived it by his motion, which was in effect a general appearance in the action. *Yale v. Edgerton*, 11 Minn. 271; *Tyrrell v. Jones*, 18 Minn. 312; *Curtis v. Jackson*, 23 Minn. 268; *Covert v. Clark*, 23 Minn. 539; *Kanne v. Minneapolis & St. L. Ry. Co.*, 33 Minn. 419.

*Robb & Slack*, for respondent.

Defendant did not by his motion make a general appearance and thereby waive all irregularities. This is the issue on this appeal. Defendant accepts as the rule of *St. Louis Car Co. v. Stillwater Street Ry. Co.*, 53 Minn. 129, that an appearance for any other purpose than to question the jurisdiction of the Court, is general. But the appearance in this action was for the purpose of questioning the jurisdiction and was not general. *Millette v. Mehmke*, 26 Minn. 306.

MITCHELL, J. The summons in this action was regular upon its face, and was served in the manner provided by statute. It stated that the complaint was filed, but in fact it had not been, and no copy was served with the summons. On this ground the defendant made a motion to have the service of the summons set aside, and the action dismissed. The motion was confined to this specific purpose, but the attorneys signed the notice of motion as "attorneys for defendant," without expressly limiting their appearance to that purpose. This the plaintiff, in the original brief, claimed

amounted to a general appearance, which waived all defects in the service of the summons. Had the defect complained of gone to the jurisdiction of the court over the person of the defendant, there might possibly have been something in the point, although it will appear from the general tenor of our decisions on the subject that, in determining whether an appearance was general or special, we have looked to the purposes for which it was made, rather than to what the party had labeled it. But it is settled by *Millette v. Mehmke*, 26 Minn. 306, (3 N. W. 700,) that the court acquired jurisdiction by the service of the summons, and that the failure to file or serve the complaint was a mere irregularity, the remedy for which was by motion to set aside the service; and it was never held that an appearance by making a motion for the sole purpose of taking advantage of an irregularity amounted to a waiver of it. So far from being a waiver of the irregularity, it is just the reverse of it. In a supplemental brief, counsel seem to admit this, and to abandon their original ground, but claim that the court did not, under the circumstances, exercise a proper discretion in setting aside the service of summons. The only showing made by plaintiff in opposition to the motion was an affidavit by one of his counsel that, at the time he issued the summons, he was informed and believed that defendant was about to leave the state before he could prepare and file a written complaint, and that defendant would be absent from the state a long time, and that he (counsel) afterwards prepared a complaint, without unnecessary delay, which was filed on the second day after the service of the summons.

Assuming that a showing might be made which would require the court to refuse to set aside the service of the summons notwithstanding the irregularity, yet this affidavit failed to make out any such case. For aught that appeared on the hearing of the motion, the defendant might still have been within the state, so that new service might have been made on him.

Order affirmed.

(Opinion published 57 N. W. Rep. 141.)

JOHN HALUPTZOK *vs.* GREAT NORTHERN RAILWAY CO.

Argued Nov. 28, 1893. Affirmed Dec. 7, 1893.

No. 8424.

**Master liable for acts of his servant.**

If a servant who is employed to perform certain work for his master procures another person to assist him, the master is liable for the negligence of the latter, only when the servant had authority to employ such assistant.

**Authority of a servant to employ others may be implied.**

But this authority may be implied from the nature of the work to be performed, or from the general course of conducting the business of the master by the servant; and it is not necessary that there should be an express employment of the person in behalf of the master, or that compensation be paid or expected. It is enough to render the master liable if the person guilty of the negligence was at the time in fact rendering service for him by his consent, express or implied.

Appeal by defendant, Great Northern Railway Company, from an order of the District Court of Wright County, *Thomas Canty, J.*, made April 15, 1893, denying its motion for a new trial.

On the afternoon of July 18, 1892, Alfonzo Haluptzok, eight year old, son of plaintiff, John Haluptzok, was on the platform of the railway depot of defendant in Waverly in Wright County. While there his left foot was seriously injured by being run over by one of the wheels of a baggage truck loaded with freight. The truck was at the time being handled by James O'Connell, a young man learning telegraphy there, under the circumstances stated in the opinion.

The father brought this action in behalf of his son, as provided by 1878 G. S. ch. 66, § 34, and obtained a verdict for \$300. Defendant moved for a new trial. Being denied, it appeals.

*W. E. Dodge and Wendell & Pidgeon*, for appellant.

The only question presented by this record is, whether or not there was any evidence tending to establish the relation of master and servant between the defendant and James O'Connell. *Wood, Master and Serv.* § 309; *Patterson, Railway Accidents*, § 103; *Kimball v. Cushman*, 103 Mass. 194; *Norris v. Kohler*, 41 N. Y. 42; *Jewell v. Grand Trunk Ry. Co.*, 55 N. H. 84.

*Wm. E. Culkin and J. T. Alley, for respondent, cited Wood, Master and Serv. § 306; McCoun v. New York C. & H. R. R. Co., 66 Barb. 338; Karsen v. Milwaukee & St. P. Ry. Co., 29 Minn. 12; Hoffman v. Chicago, M. & St. P. Ry. Co., 43 Minn. 334; Wilson v. Northern Pac. R. Co., 43 Minn. 519; Nichols v. Chicago, St. P., M. & O. Ry. Co., 36 Minn. 452; Althorf v. Wolfe, 22 N. Y. 355; Booth v. Mister, 7 Car. & P. 66; Randleson v. Murray, 8 Ad. & E. 109.*

**MITCHELL, J.** The plaintiff brought this action to recover for personal injuries to his infant child, caused by the negligence of the alleged servant of the defendant. 1878 G. S. ch. 66, § 34.

The injuries were inflicted by one O'Connell, and the only question presented by this appeal is whether O'Connell was defendant's servant. The evidence, in which there is no material conflict, is substantially as follows: The defendant maintained a public depot and freight and passenger station at the village of Waverly. The premises were owned and controlled by the defendant, but the Great Northern Express Company and the Western Union Telegraph Company had their offices in the same building, one Westinghouse being the common agent for all three companies. Westinghouse had exclusive charge of all of defendant's business at the station. He testified that he had no authority to employ any assistants, such authority being exclusively vested in the general officers of the company; and, as respects express authority, this testimony is not contradicted. For a year or more before the injury complained of, Westinghouse had permitted a young man named Fouch to use and practice on the instruments in the office, for the purpose of learning telegraphy; and during that time Fouch had been in the habit, as occasion required, of assisting Westinghouse in the performance of his railway duties, such as selling tickets, handling freight, putting out switch lights, etc. He had no contract with the railway company, and received no wages; the work he did evidently being in return for the privilege of the office, and the use of the instruments, in learning telegraphy. There is no evidence that the general officers of the defendant knew of or assented to Fouch's performing this work, except the length of time it had continued, and the absence of any testimony that they ever objected. About ten days before the accident, Westinghouse, with the permission of

the Western Union Telegraph Company, gave O'Connell the privilege of the office, and the use of the instruments, for the purpose of learning telegraphy, evidently under substantially the same arrangement by which he had previously given Foutch similar privileges. O'Connell had no contract with the defendant, and received no wages. The time between his coming into the office and the date of the accident was so brief that the evidence is very meager as to his doing railroad work about the station during that time, but there was evidence tending to show that he had on several occasions, with the knowledge and consent of Westinghouse, handled freight. On the day in question, he went to work, with a truck, to move some goods from the station platform into a freight room. Foutch assisted him by piling up the goods in the room while O'Connell carried them in. While thus handling the truck, O'Connell ran it against plaintiff's child, who was walking around the depot, and inflicted the injury complained of. There is no evidence that at or prior to the accident the general officers of the defendant knew that O'Connell was employed about the station. But both Foutch and O'Connell, after the accident, continued at the depot, practicing telegraphy, and assisting Westinghouse, as before, in selling tickets, handling freight, etc., and were still doing so at the date of the trial, which was five months after the accident and over four months after the commencement of this action; and, while there is no direct evidence that this was with the knowledge of the general officers of the defendant, there is no evidence that they did not know of it, and none that they ever objected to it. Such we believe to be a fair and full statement of the effect of the evidence.

Under the doctrine of respondeat superior, a master, however careful in the selection of his servants, is responsible to strangers for their negligence committed in the course of their employment. The doctrine is at best somewhat severe, and, if a man is to be held liable for the acts of his servants, he certainly should have the exclusive right to determine who they shall be. Hence, we think, in every well-considered case where a person has been held liable, under the doctrine referred to, for the negligence of another, that other was engaged in his service either by the defendant personally, or by others by his authority, express or implied. There is a class of cases, of which *Bush v. Steinman*, 1 Bos. & P. 404, (often doubted

and criticised,) is an example, which seem to hold that a person may be liable for the negligence of another, not his servant. But these were generally cases where the injury was done by a contractor, subcontractor, or their servants, upon the real estate of the defendant, of which he was in possession and control; and they seem to proceed upon the theory that, where a man is in possession of fixed property, he must take care that it is so used and managed by those whom he brings upon the premises as not to be dangerous to others. In that view, he is held liable, not for the negligence of another, but for his own personal negligence in not preventing or abating a nuisance on his own premises. See *Laugher v. Pointer*, 5 Barn. & C. 547. There will also be found in some text-books statements to the effect that where a servant is employed to do a particular piece of work, and he employs another person to assist him, the master is liable for the acts of the person so employed, as much as for the acts of the servant himself. Thus generally stated, without qualification, the proposition is misleading, as well as inaccurate.

The cases most generally cited in support of it are *Booth v. Mister*, 7 Car. & P. 66, and *Althorf v. Wolfe*, 22 N. Y. 355. In *Booth v. Mister* the defendant's servant, whose duty it was to drive his master's cart, was riding in the cart, but had given the reins to another person, who was riding with him, but was not in the master's employment, and through the negligent management of this other person the plaintiff was injured. The defendant was held liable, not for the mere negligence of such other person, but for the negligence of the servant himself, who was riding in the cart, and either actively or passively controlling and directing the driving, as much as if he had hold the reins in his own hands.

In *Althorf v. Wolfe*, a servant, having been directed to remove snow from the roof of his master's house, secured the services of a friend to assist him; and while the two were engaged together, in throwing the snow from the roof into the street, a passer-by was struck and killed. It was held that it was immaterial which of the two threw the ice or snow which caused the injury; that in either case the master was liable. The case is a very unsatisfactory one, and it is very difficult to ascertain the precise ground upon which it was

decided. Wright, J., seems to put it on one or all of three grounds: (1) That the servant had implied authority to procure assistance; (2) that defendant's family, who were left in charge of the house, ratified the act of the servant; and (3) upon the same ground upon which *Booth v. Mister* was decided. On the other hand, Denio, J., seems to place his opinion upon the ground upon which we have suggested that *Bush v. Steinman* proceeds. It is also to be observed that two of the justices dissented. But neither of these cases, if rightly understood, is in conflict with the proposition with which we started out,—that a master, as such, can be held liable for the negligence only of those who are employed in his work by his authority; and hence, if a servant who is employed to perform a certain work procures another person to assist him, the master is liable for the sole negligence of the latter, only when the servant had authority to employ such assistant. Such authority may, however, be implied as well as express, and subsequent ratification is equivalent to original authority; and, where the servant has authority to employ assistants, such assistants, of course, become the immediate servants of the master, the same as if employed by him personally. Such authority may be implied from the nature of the work to be performed, and also from the general course of conducting the business of the master by the servant for so long a time that knowledge and consent on part of the master may be inferred. It is not necessary that a formal or express employment on behalf of the master should exist, or that compensation should be paid by or expected from him. It is enough to render the master liable if the person causing the injury was in fact rendering service for him by his consent, express or implied.

Under this view of the law, the evidence made a case for the jury to determine whether Westinghouse had implied authority from the defendant to employ O'Connell as an assistant, or, to state the question differently, whether O'Connell was rendering these services for the defendant by its consent.

If the evidence were limited to the employment of O'Connell alone, and to what occurred during the ten days preceding the accident, it would probably be insufficient to support a verdict in favor of the plaintiff. But it is an undisputed fact that Westinghouse had for over a year before this been employing Foutch as an

assistant under a similar arrangement, without, so far as appears, any objection on part of the defendant, although the length of time was such that its knowledge of the fact may be fairly inferred. It is true that implied authority to employ Foutch as assistant would not necessarily include authority to employ O'Connell, but the fact of Foutch's long-continued employment has an important bearing upon the question of Westinghouse's implied authority, as indicated by the manner of conducting the business; and, as bearing upon this same question of implied authority, the fact is significant that after the accident both Foutch and O'Connell continued, without objection, to perform these services for defendant, as assistants to Westinghouse, up to the date of the trial. Additional force is added to all this, when considered in connection with the nature of the duties of a station agent at a place like this, which are of such multifarious character as to render the employment of an occasional assistant not only convenient, but almost necessary. The facts that the consideration for the services of these assistants moved from Westinghouse, rather than defendant, and that their aid was for the accommodation or convenience of Westinghouse, are not controlling.

There is nothing in the point that defendant is not liable because the freight which O'Connell was moving had been delivered to the consignee, who had promised to take care of it where it laid, on the station platform.

O'Connell's act was in the line of his employment, and was being done in furtherance of defendant's business. The liability of the defendant to third parties cannot be made to depend upon the question whether, as between it and the owner of the goods, it owed the latter the continued duty of taking care of them.

Order affirmed.

(Opinion published 57 N. W. Rep. 144.)



*In re* MARY K. YETTER'S ESTATE.

Argued Nov. 17, 1893. Affirmed Dec. 7, 1893.

No. 8407.

**Verdict supported by the evidence.**

Evidence held to justify the verdict.

**Burden of proof, refusal to charge the jury as to.**

Where the evidence conclusively proves a fact, it is not error for the court to refuse to charge the jury upon which party the burden of proof originally rested.

**Error without prejudice.**

Nor is it prejudicial error to admit incompetent evidence of a fact, when such fact is otherwise conclusively proved.

Appeal by Hugo F. Yetter, as administrator of the estate of Mary K. Yetter, deceased, from an order of the District Court of Hennepin County, *Seagrave Smith, J.*, made May 13, 1893, denying his motion for a new trial.

Mary K. Yetter died intestate November 30, 1891, at Minneapolis, and Hugo F. Yetter was appointed January 4, 1892, by the Probate Court of Hennepin County, administrator of her estate. A claim of \$3,425 for moneys had and received was presented March 31, 1892, for allowance against her estate by Bernhardt R. Zwick and Joseph C. Zwick, as executors of the will of her mother, Emily K. Zwick, deceased. The claim was disallowed and they appealed to the District Court. Pleadings were there framed (Laws 1889, ch. 46, § 260) and the issues tried January 30, 1893, and a verdict rendered allowing \$3,347.17 against the estate of Mrs. Yetter. The administrator moved for a new trial, and being denied he appeals.

*W. H. Adams*, for appellant.

*Johnson, Leonard & McCune*, for respondents.

MITCHELL, J. This matter came up to the District Court on appeal from an order of the Probate Court disallowing a claim of the estate of Emily K. Zwick, deceased, against the estate of Mary K. Yetter, deceased, for money had and received by the latter as agent of the former, and which had not been paid over or accounted for.

Numerous sums were claimed in the complaint, but on the trial all were abandoned except two, viz.: \$2,704, received on the Pauly mortgages, and \$318 on the Ermentrout mortgage.

The uncontradicted evidence is that Mrs. Yetter was the only daughter of Mrs. Zwick, and had for years been her agent for the transaction of her business in collecting, handling, and disbursing her money, with authority to indorse checks, etc.; that the Pauly and Ermentrout mortgages belonged to the mother; that these mortgages were paid by the respective mortgagors,—the Pauly mortgage (\$2,704) on October 3, 1889, and the Ermentrout mortgage (\$318) on February 5, 1891. The evidence, as we think, also conclusively shows that these payments were made to Mrs. Yetter as agent for her mother. It is urged that Randall, the only living witness of the transaction, (Pauly having died,) could not testify that Mrs. Yetter was the person to whom the Pauly mortgage was paid, as he did not know her personally, but merely testified that Pauly introduced her to him as Mrs. Zwick's daughter. But it appeared that Mrs. Zwick was at the time in California, whence Mrs. Yetter, according to her own statements, had come to Minneapolis to attend to her mother's business, and that the woman thus introduced to Randall and to whom the money was paid had possession of the satisfaction of the mortgages, executed by Mrs. Zwick in California, and which she delivered to Pauly on his payment of the money. The conclusion is irresistible that the woman was Mrs. Yetter. The money on the Ermentrout mortgage is also traced into her hands by the fact that the checks in which it was paid were indorsed in her handwriting.

It further appears that Mrs. Yetter deposited moneys that came into her hands in a savings bank, the book account commencing in January, 1885, with a deposit of \$900, and continuing open until the time of her death, in November, 1891, at which time there was over \$5,000 to her credit, the only withdrawal during all the time being \$22.50 in July, 1885. It also appears that Mrs. Yetter made a deposit in the bank of \$2,700 on the 3d of October, 1889, and of \$350 on February 5, 1891, the exact dates on which the mortgages referred to were respectively paid. It was also practically undisputed that Mrs. Yetter had no property, money, or source of income, except what she received from her mother. It seems to us that this

chain of evidence conclusively proved (1) that Mrs. Yetter received the money on these mortgages, and (2) that she never paid it over to her mother. Under this state of facts the admission of the testimony of the witness Corrigan as to what Pauly testified to in the Probate Court (and which went only to the fact that he paid the money to Mrs. Yetter) was, at most, error without prejudice. It also follows that, in view of this state of evidence, there was no error in the court's refusing to instruct the jury that the burden was on the executors of Mrs. Zwick to prove both that Mrs. Yetter had received the money, and also that she had not paid it over, or accounted for it, to her mother.

As we view the evidence, the only question for the jury was whether Mrs. Zwick had made a gift of the money to her daughter. The burden of proving this was, of course, on the administrator. The only evidence tending to prove this was the testimony of some neighbors as to casual conversations with Mrs. Zwick, in which she stated that her daughter had plenty of money in bank, etc., and that she (the mother) had given her money and property, because she (the daughter) had received nothing from her father, who had given everything to his sons. To say nothing of the somewhat remarkably exact correspondence in the testimony of these witness, this evidence was subject to all the uncertainties of slippery memory as to casual conversations which partook largely of the character of neighborhood gossip. Moreover, it was a fair question for the jury whether these statements of Mrs. Zwick, if made, might not have referred to money and property to a considerable amount, which it appears she had given her daughter years before. Without stopping to mention other pertinent facts, we are of opinion that the evidence, taken as a whole, was not such as to require the jury to find that the mother had made a gift of this money to her daughter.

We have examined all of appellant's numerous assignments of error, and find nothing else in them worthy of special notice.

Order affirmed.

(Opinion published 57 N. W. Rep. 147.)

Application for reargument denied December 19, 1893.

## HENRY M. BRADLEY vs. ROBERT B. WHITESIDES.

Argued Nov. 27, 1893. Affirmed Dec. 7, 1893.

No. 8847.

**Soldier's right to additional land is assignable.**

*Webster v. Luther*, 50 Minn. 77, followed as to the assignability of the right of entry of "a soldier's additional homestead."

**power of attorney construed.**

A power of attorney, to convey certain lands to be thereafter acquired, ~~add~~ to sufficiently identify the land which was the subject of the power.

Appeal by plaintiff, Henry M. Bradley, from a judgment of the District Court of St. Louis County, *M. J. Severance*, J., entered December 22, 1892, that he had no cause of action against the defendant, Robert B. Whitesides and dismissing the action on the merits, with costs.

*J. L. Washburn and L. E. Judson*, for appellant.

The Court erred in finding the power of attorney to be a good and valid instrument and effective for the purpose for which it was executed. Powers of attorney are construed strictly, general terms are limited by particular words. *Gilbert v. How*, 45 Minn. 122; *Roundtree v. Denson*, 59 Wis. 522; *Webster v. Morris*, 66 Wis. 366; *Craighead v. Peterson*, 72 N. Y. 279; *Rossiter v. Rossiter*, 8 Wend. 494; *Taylor v. Robinson*, 14 Cal. 396.

*Jaques & Hudson*, for respondent.

While the power does not specifically describe the land, which the attorney was empowered to convey, by government subdivision, it makes it plain that the attorney or substitute was authorized to sell and convey any lands which Benjamin F. Johnson might acquire after its execution under U. S. Rev. Stat. § 2306, additional to his claim in Kansas. *Berkey v. Judd*, 22 Minn. 287; *Bigelow v. Livingston*, 28 Minn. 57; *Webster v. Luther*, 50 Minn. 77.

MITCHELL, J. Both parties claim title to the premises in controversy through Benjamin F. Johnson. He entered the land Octo-

ber 20, 1883, as "a soldier's additional homestead," under U. S. Rev. Stat. § 2306. The plaintiff claims under a deed from Johnson to his grantor, Hartman, executed in June, 1890.

The chain of deeds under which defendants claim is (1) letters of attorney, with power of substitution, from Johnson to one Wine, executed July 27, 1882; (2) an instrument by Wine, substituting Whitesides, executed February 23, 1883; (3) a conveyance from Johnson by Whitesides, as such substituted attorney, to one Harvey, executed October 20, 1883; (4) a conveyance of the same date from Harvey to Whitesides.

In view of the admissions in the reply as to defendants' possession, and plaintiff's notice of defendants' claim of title, when his deed from Johnson was obtained, the fact that the instrument substituting Whitesides for Wine was not then on record is immaterial.

In so far as the so-called "power of attorney" may have been intended as an assignment by Johnson of his right of entry, or of all beneficial interest in it, when made, the case is fully covered by *Webster v. Luther*, 50 Minn. 77, (52 N. W. 271,) in which we held that this right was assignable.

The only remaining question is whether the power of attorney sufficiently describes or furnishes the means of identifying the land which was the subject of the power. It authorizes the attorney to sell "any lands obtained by me as an additional homestead, under the provisions of section 2306 of the Revised Statutes of the United States, to my original homestead on W.  $\frac{1}{4}$ , S. E.  $\frac{1}{4}$ , sec. 8, T. 25, R. 16, Kansas, and to sell any such lands as I may hereafter acquire under said section." The evidence conclusively identifies the land in controversy as land which Johnson did afterwards acquire under the statute as an additional homestead to his original homestead in Kansas.

The sufficiency of the power, and of the identification of the land in question as the subject of the power, would hardly have been questioned, except for the fact that in a subsequent part of the instrument it is stated that "the lands hereinbefore referred to are the following, viz.," followed by a blank, no lands being in fact described.

We cannot see how this either adds to or takes from what had preceded. The words quoted amounted to nothing, and are mere

surplusage. If the land had been already entered, so that the specific description was known, such description might have been inserted in the blank; but as, in this case, the entry had not yet been made, this was impossible. Presumably, a printed form was used, and perhaps it would have been in better form for the scrivener to have erased these words, as inapplicable, but his failure to do so did not affect the sufficiency of that which preceded.

The rule invoked by counsel, that "general terms are limited by particular words," has no application to the case.

Judgment affirmed.

(Opinion published 57 N. W. Rep. 142.)

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DENNIS F. McGRATH vs. THOMAS E. CANNON *et al.*

Argued Nov. 23, 1893. Affirmed Dec. 7, 1893.

No. 8429.

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57 191  
57 196

**Recovery in case of only part performance.**

The rule that a party who has refused to fully perform his contract cannot recover for part performance applies only to entire, and not to severable, contracts, which are, in effect, separate agreements as to different subjects, although made at the same time.

Appeal by defendants, Thomas E. Cannon and Daniel Moody, from an order of the District Court of Clay County, *Frank Ives, J.*, made April 11, 1893, denying their motion for a new trial.

This action was upon a promissory note made by defendants April 16, 1892, for \$1,254.95 and given plaintiff, Dennis F. McGrath in part payment for a stock of hardware they bought of him that day at Barnesville. They answered that plaintiff agreed to sell to them his stock of lumber, as well as his hardware, and they agreed to pay for both what they should be found to be reasonably worth. That an inventory was taken of the hardware and it was found worth \$4,509.89 on which they paid \$2,000 and gave their two notes for the balance, each for \$1,254.95 and took it into their possession. That plaintiff then refused to sell or deliver the lumber, that the

whole was but one agreement, that plaintiff has failed to perform it on his part and, because thereof, cannot enforce performance by defendants.

On the trial January 14, 1893, the jury returned a verdict for plaintiff for the amount of the note with interest. Defendants moved for a new trial, but were refused and they appeal.

*James H. Foote and Frank H. Peterson, for appellants.*

When a party refuses to fully perform his contract according to its terms he cannot recover for part performance. *Dula v. Cowles*, 7 Jones, 290; *Jones v. Mial*, 89 N. C. 89; *Oakley v. Morton*, 11 N. Y. 25; *Catlin v. Tobias*, 26 N. Y. 217; *Superintendent of Schools v. Bennett*, 3 Dutch. 513; *Smith v. Brady*, 17 N. Y. 173; *Glacius v. Black*, 50 N. Y. 145; *Boutin v. Lindsley*, 84 Wis. 644; *Koplitiz v. Powell*, 56 Wis. 671.

There is a tendency in the courts of some of the states to relax in some degree the strictness of the old rule regarding the performance of contracts and to follow that laid down in the case of *Britton v. Turner*, 6 N. H. 481. But the incomplete performance must not have been the result of the party's own seeking or of causes which he might, with ordinary diligence, have provided against.

*Charles S. Marden and Charles C. Houpt, for respondent.*

Even if the contract was made as claimed by defendants, it was not entire. It is the rule, where personal property is sold to be delivered at different times in distinct parcels and to be paid for at a stipulated price on delivery, the seller is entitled to recover for the parcel or installment delivered, although he make default in the delivery of the others. *Loomis v. Eagle Bank*, 10 Ohio St. 327; 2 Parsons, Cont. 29; *Sutherland*, Dam. § 645.

MITCHELL, J. It seems to us that there are more grounds than one on which the order appealed from might be affirmed, but we shall consider the case upon the lines upon which counsel have argued it.

Accepting as true the testimony of defendant Cannon, the facts were as follows: Plaintiff was the owner of a stock of hardware, and also of a stock of lumber. Cannon was negotiating for the purchase

of the hardware, and was about making a contract for it when plaintiff refused to sell it, unless Cannon would also buy the "lumber business," or find a purchaser for it. Cannon had no desire to buy the lumber, but, in order to get the hardware, verbally agreed to buy it, or find a purchaser for it; nothing whatever being said as to terms or price. Cannon and plaintiff thereupon executed the contract, Exhibit A, which on its face purports to be a complete expression of the mutual obligations of the parties, and has reference solely to the hardware. In accordance with the terms of this contract, the parties proceeded, and took an inventory of the hardware, and upon its completion plaintiff executed a bill of sale of it to the defendants, (Moody having become interested with Cannon in the purchase,) and they made payment therefor, partly in cash and partly in two promissory notes, one of which is the note in suit.

Moody attempted to testify that he paid his part of the cash on the hardware and lumber together, but nothing of the kind was communicated to plaintiff, and the evidence is perfectly conclusive that both the cash and the notes were paid or given and accepted for the price of the hardware exclusively, in exact accordance with the terms of the contract, Exhibit A. Defendants took, and still retain, possession of the hardware. On the occasion when the deal as to the hardware was closed up the defendants requested plaintiff to enter into a writing for the lumber business, and to proceed to have an inventory of the stock taken; but he refused to do either at that time, and has subsequently refused to do so at all, or to deliver the lumber to defendants, although they offered to pay him its market value. When sued on one of the notes given for the hardware, the defendants set up plaintiff's nonperformance of the contract as respects the lumber, for the purpose, as it would seem from their answer and from the evidence introduced on the trial, of counterclaiming or recouping their damages against the note, but, as now claimed in this court, as a complete defense to the action.

The doctrine which defendants invoke is that to entitle a party to recover on a contract he himself must have fully performed on his part, and that when he has refused to fully perform his contract according to its terms he cannot recover for part performance. But from the leading case of *Cutter v. Powell*, 6 Term R. 320, down, this rule has been held applicable only to contracts which are entire,



and not to those which are severable. This distinction has always been recognized by this court. Compare *Weber v. Clark*, 24 Minn. 354; *Nelichka v. Esterly*, 29 Minn. 146, (12 N. W. 457;) and *Peter-son v. Mayer*, 46 Minn. 468, (49 N. W. 245,)—with *Spear v. Snider*, 29 Minn. 463, (13 N. W. 910.)

Without attempting to enter into any general investigation of the question, so often discussed, as to when a contract is entire and when it is severable, and without committing ourselves to the length to which courts have sometimes gone in holding certain executory contracts severable, so as to defeat the right of one party to rescind upon some default of the other party, it is sufficient for us to say that, even conceding that upon the facts of this case there was a valid contract for the sale of the lumber as well as the hardware, yet, according to all the authorities, it was not entire, but severable; or, to speak accurately, there were two separate contracts, although made at one and the same time. Whether a contract is entire or severable, like most questions of construction, depends on the intention of the parties, and must be determined in each case by considering the language employed and the subject-matter of the contract, and how the parties themselves treated it.

One of the best statements of the law on the subject, and one often cited by the courts with approval, is that in 2 Parsons, Cont. 648, which is: "If the part to be performed by one party consists of several distinct items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such contract will generally be held to be severable."

As complete and legally accurate a statement of the rule as anywhere to be found is that of Mr. Justice Field in *Norris v. Harris*, 15 Cal. 226, viz.: "A contract made at the same time, for different articles, at different prices, is not an entire contract, unless the taking of the whole is essential from the character of the property, or is made so by the agreement of the parties, or unless it is of such a nature that a failure to obtain a part of the articles would materially affect the object of the contract, and thus have influenced the sale had such a failure been anticipated." Without again repeating the facts of this case, it is enough to say that, in view of the subject-matter, the language of the parties, and the conduct of the parties with reference to the subject, the contract as to the hardware

and that as to the lumber, if one was made, were really two distinct contracts, although entered into at one time. It is also worthy of remark that, in view of the harshness of the rule which prevents one who has failed to fully perform his contract from recovering anything for part performance, the benefits of which the other party has received, the courts are inclined, whenever they consistently can, in cases of this kind, to construe the contract as severable, rather than entire. This works out substantial justice, for it permits the one party to recover for what he has performed, but at the same time permits the other party to counterclaim or recoup whatever damages he has sustained by the nonperformance of other items of the contract. To illustrate by the present case: By holding the contract severable, the plaintiff can recover the price of the hardware, against which defendants may offset their damages for the nondelivery of the lumber; while, if defendants' contention is correct, had the sale of the hardware been wholly on credit, they might have retained it without paying a dollar.

Assuming that there was a valid contract for the sale of the lumber business, of course defendants were entitled to recover damages for its nonperformance. There is neither allegation nor proof that there was any good will connected with the business, so that the contract was, in effect, merely one for the sale of so much lumber; and the measure of damages would be merely the difference between the contract price and the market value of lumber at the time and place when and where the defendants were entitled to it, according to the terms of the contract. As to this, there was neither allegation nor proof, and, indeed, there could not well have been, in view of the fact that no contract price was ever agreed on.

Under defendants' answer, they were not entitled to recover more than nominal damages, and the court ought to have directed a verdict in favor of the plaintiff for the amount of the note. In view of this fact, the errors assigned as having occurred on the trial are wholly immaterial.

Order affirmed.

(Opinion published 57 N. W. Rep. 150.)

GEORGE A. DU TOIT *vs.* HALVOR FERGESTAD.

Argued by appellant, submitted on brief by respondent, Nov. 16, 1893. **Affirmed**  
Dec. 11, 1893.

No. 8530.

**Certificate on appeal from an interlocutory order.**

Upon an appeal to this court from an order disposing of an interlocutory motion, it must be made to appear affirmatively—either by the certificate of the judge making the order that the return contains all of the files and papers used at the hearing of the motion, or by the certificate of the clerk of the proper court that his return contains copies of all the records and files in the case—that this court has before it everything which was presented to and considered by the court below.

Appeal by defendant, Halvor Fergestad, from an order of the District Court of Carver County, *Thomas Canty*, J., made April 11, 1893, refusing to vacate a writ of attachment.

On February 10, 1893, the plaintiff, George A. Du Toit of Chaska commenced this action to recover \$866.60 balance claimed to be due him for 309,500 kiln run brick, sold August 1, 1892, and delivered by rail to defendant at St. Louis Park at \$6.25 per M. to be used in building the shops of Minneapolis Esterly Harvester Works. On the same day plaintiff made affidavit that Fergestad was about to dispose of his property with intent to delay his creditors and obtained a writ of attachment and under it the sheriff seized the brick. Defendant answered and also made an affidavit of his solvency and denying the intent charged. On them he moved the Court on notice April 1, 1893, to vacate the attachment. The plaintiff read counter affidavits, and on April 11, 1893, the Court denied the motion. The next day the defendant appealed from the order, but it seems that before the Clerk made his return to this Court the issues were tried and plaintiff had a verdict for \$687.30. A copy of this verdict was included in the return to this Court, but there was no certificate of Judge or Clerk that the papers sent here were read on the hearing of the motion to vacate the attachment, or that copies of all the papers read were included in the return.

*J. H. Long*, for appellant.

*W. C. Odell*, for respondent.

COLLINS, J. This was an appeal from an order of the district court denying defendant's motion to vacate and set aside a writ of attachment, and all proceedings thereunder, on the ground that the affidavit upon which the writ was based was false and untrue. The return to this court, according to the clerk's certificate, contains copies of "the original summons, complaint, answer, reply, verdict, affidavit and order for attachment, affidavit and notice of motion for an order dissolving attachment, counter affidavit by plaintiff, defendant's affidavit, order denying motion to dissolve attachment, and notice of appeal to the supreme court." Nothing further appears in the return or the certificate.

There is no certificate of the judge who heard and disposed of the motion that the return shows all that was offered or considered by him upon the hearing of the same, nor has the clerk certified that his return contains copies of all of the records and files in the case. One or the other of these two things should appear, if we are to observe anything like an orderly practice. *Hospes v. Northwestern M. & C. Co.*, 41 Minn. 256, (43 N. W. 180.) See, also, *Prouty v. Hallouell*, 53 Minn. 488, (55 N. W. 623.) Without one or the other of these certificates, we have no means of knowing what was presented or considered by the court on the hearing of the motion. As was said in the opinion in the case first above cited, to pass upon any matter on appeal it must be made to appear to this court that it has before it everything which was presented to and considered by the court below upon the matter which we are called upon to review. The record fails to show this fact, and hence error in the ruling of the court below has not been made to appear. To avoid any misunderstanding as to the proper practice, we state that, on an appeal from an order disposing of an interlocutory motion, it must be made to appear affirmatively, either by the certificate of the judge making the order, or the certificate of the clerk of the proper court, of the nature heretofore indicated, that this court has before it everything which was presented to and considered by the court below.

Order affirmed.

(Opinion published 57 N. W. Rep. 204.)

STATE OF MINNESOTA *vs.* WILLIAM HERGES.

Submitted on briefs Dec. 8, 1893. Affirmed Dec. 11, 1893.

No. 8611.

**Statutes against incest.**

The crime of incest was punishable under Penal Code, § 259, prior to the passage of Laws 1893, ch. 90.

On the trial of William Herges in the District Court of Stearns County, *D. B. Searle, J.*, he was convicted June 6, 1893, of the crime of incest committed March 22, 1892. Questions of law arose, which in the opinion of the Judge were so important and doubtful as to require the decision of this Court. The defendant consenting, the Judge reported the case so far as was necessary to present the questions and certified the report to this Court. Defendant claimed that at the time the alleged offence was committed, incest was not a crime in this State and that by Laws 1893, ch. 90, the prior statute was repealed without saving prior offences. These claims were overruled and at his request the questions were reported and certified.

*Bruckart & Brower*, for the accused.

Incest was always a punishable offence by the ecclesiastical laws, but was not indictable as an ordinary crime either in England or in this country until made so by statute. 1 Bish. Mar. & Div. § 735; Bishop, Stat. Crimes, § 727, 728; *State v. Kessler*, 78 N. C. 469; 10 Am. & Eng. Ency. 335.

Laws 1893, ch. 90, repealed all the statutes in regard to incest existing at the time of its enactment. This indictment was found subsequent to the taking effect of this act, but the offence is alleged to have been committed long prior thereto. To convict and punish the defendant under this indictment, it is necessary to apply the provisions of the new *ex post facto* law.

*H. W. Childs*, Atty. Genl., *Geo. B. Edgerton*, his assistant, and *John D. Sullivan*, County Atty., for the State.

Incest was a crime under the Penal Code, § 259. The repeal did not affect any penalty incurred under the prior statute, 1878 G. S. ch. 4, § 3.

**COLLINS, J.** The defendant was indicted for the crime of incest, alleged to have been committed prior to the passage of Laws 1893, ch. 90, and after trial and conviction a report of the case was certified up for our decision, under the provisions of 1878 G. S. ch. 117, § 11. The claim is made in defendant's behalf that under the laws of this state as they existed at the time specified in the indictment incest was not a crime.

Prior to the amendment of 1893, section 259 of the Penal Code read as follows: "Incest. When persons within the degrees of consanguinity within which marriages are declared by law incestuous and void, intermarry or commit adultery or fornication with each other, each of them is punishable by imprisonment in the state prison for not more than ten years." It is contended by defendant's counsel that, as the only statutes which bear upon the subject—one prohibiting the contract of marriage between parties who are nearer of kin than first cousins, computing by the rules of the civil law, whether the half or the whole blood, (1878 G. S. ch. 61, § 3;) the other pronouncing such marriages void, (1878 G. S. ch. 62, § 1)—fail to declare them incestuous, the offense cannot be committed; it being purely statutory. Incest is defined as the carnal copulation of a man and woman related to each other in any of the degrees within which marriage is prohibited by law. A marriage between persons within the specified degrees of consanguinity must necessarily be incestuous under the law, and no use of that precise word or statutory declaration to that effect was needed.

The defendant is liable to the punishment prescribed in Penal Code, § 259, and the case is remanded for further proceedings.

(Opinion published 57 N. W. Rep. 205.)

v.55M.—30

**STEPHEN C. RUGLAND vs. THORE THOMPSON et al.**

Submitted on briefs Nov. 23, 1893. Reversed Dec. 11, 1893.

No. 8566.

**Verdict not supported by the evidence.**

*Held*, upon the evidence in this case, that the court below erred when refusing to grant plaintiff's motion for a new trial.

Appeal by plaintiff, Stephen C. Rugland, from an order of the District Court of Grant County, *Calvin L. Brown, J.*, made September 22, 1893, denying his motion for a new trial.

*Charles C. Houpt*, for appellant.

*Reynolds & Townsend*, for respondent.

**COLLINS, J.** One of the defendants, Thore Thompson, had purchased, upon time, two tracts of school land, of forty acres each, and there had been issued to him, by the State Land Commissioner, certificates therefor. These had been assigned to one Fuglie as security for money borrowed by Thompson. The latter then applied to plaintiff for a loan of money sufficient to pay Fuglie, and to pay interest on the certificates and back taxes, offering the security held by Fuglie. Thompson estimated the amount needed for these purposes at \$150, but requested plaintiff to ascertain from the county treasurer the exact sum due as interest and as back taxes. March 14, 1888, plaintiff notified Thompson that the total sum necessary was \$168.80, and took his note for that amount. At Thompson's request, he paid Fuglie \$126.80, and, as agreed upon, received an assignment of the certificates as security for the payment of the note. Taxes due in 1886 and 1887, and one year's interest,—in all, \$21.62,—were paid March 14th by plaintiff to the county treasurer, and on May 24th he paid taxes due in 1888, and one year's interest due the state on the school land certificates, amounting to \$24.01,—in all, the sum of \$45.63,—which, added to the amount paid Fuglie, made a total of \$172.43, or \$3.63 more than the amount of the note. Evidently, there was an error in computing, but it was in Thompson's favor.

This action was brought to foreclose plaintiff's claim, really a mortgage, upon the land covered by the certificates. The defense

was usury, it being claimed that the note was usurious to the extent of the difference between the amounts paid out on March 14th for taxes, interest, and to Fuglie, \$148.42, and the amount of the note \$168.80. This defense was sustained by the verdict of the jury, but we are of the opinion that the verdict ought not to be upheld. According to the charge, the result was made to depend upon the taxes of 1887, which were actually due when the note was made, although no interest or penalty attached before June 1st; and the jury were instructed that, if the payment of May 24th was a mere shift or device to escape the consequences of an usurious contract, they should not hesitate to find for defendant. If the contract was not usurious when made, it could not afterwards become so, and it is obvious from Thompson's testimony that plaintiff was authorized to pay up the taxes of 1887. He did nothing more than he was empowered to do when he paid the amounts which Thompson was under obligation to pay in order to keep the property,—his indebtedness, in fact. Thompson's testimony, fairly construed, is to the effect that he desired the plaintiff to pay off and discharge all liens upon the lands, and wished to make a loan for that purpose; the exact amount needed to be ascertained by plaintiff. The latter took his note for such sum as he figured would cover the liens, but really for less, and paid out the necessary money. We are unable to see that there was a usurious contract, upon the theory of the case on which it was submitted to the jury.

Order reversed.

(Opinion published 57 N. W. Rep. 205.)

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STATE OF MINNESOTA *ex rel.* E. H. BLAISDELL *vs.* JOHN S. BILLINGS,  
SHERIFF.

Submitted on appellant's brief Nov. 23, 1893. Affirmed Dec. 13, 1893.

No. 8373.

### Practice on Habeas Corpus.

Upon the return to a writ of habeas corpus by the officer in whose custody the person required to be produced is held, the petitioner may plead to the same, and if he fails to do so the case must be determined upon the return; and, if it appears thereby that the party is detained

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68	332
69	452



by virtue of a warrant, the question of the lawfulness of such detention must depend upon the validity of such warrant. But in such case the officer can only inquire whether the process is void because of jurisdictional defects.

#### **Warrant of commitment to State Hospital for Insane..**

Where a warrant of commitment to an asylum for insane issued under Probate Code, ch. 14, shows on its face that the party alleged to be insane, and ordered committed, was so found by the Probate Judge on the certificate and recommendation of "two examiners in lunacy," instead of a finding of insanity by the jury after due examination, as directed by the statute, *held*, that the warrant was void on its face, and the party properly discharged from custody.

#### **Practice on information of insanity.**

The practice upon such examinations considered.

#### **ON REARGUMENT.**

Argued by relator, submitted on brief by appellant, Jan. 17, 1894. Affirmed Jan. 25, 1894.

#### **Due process of law.**

"Due process of law" requires an orderly proceeding, adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing, or an opportunity to be heard, before judgment, is absolutely essential.

#### **Laws 1893, ch. 5, in part unconstitutional.**

Certain sections of Laws 1893, ch. 5, which prescribe the course of procedure, and authorize the commitment of persons to public or state, and to private, hospitals for the insane, are invalid because in conflict with those provisions of the State and the Federal constitutions which forbid that any person shall be deprived of his life, liberty, or property without "due process of law."

Appeal by John S. Billings, Sheriff of Otter Tail County, from an order of the District Court of that County, made by *R. H. Marden*, Court Commissioner, June 26, 1893, discharging from his custody, *Maria J. Blaisdell*.

On June 3, 1893, an information was filed in the Probate Court of Otter Tail County, stating that *Maria J. Blaisdell* of Pelican Rapids in that County was then insane and needing care and treatment and that it was dangerous for her to be at large. *Davis Burbank*, Judge of that Court, made an order directing *F. Ray* and *J. H. Corliss*, two practising physicians of that county, to act with him to constitute a jury to examine *Mrs. Blaisdell* and ascertain the

fact of sanity or insanity. They made examination and reported June 7, 1893, that she was insane and the Probate Court thereupon made an order June 9, 1893, committing her to the care and custody of the Superintendent of the State Hospital for insane at St. Peter and issued a warrant to John S. Billings, Sheriff, authorizing him to convey her to that Hospital. Under this warrant she was arrested and the Sheriff was about to start with her for St. Peter, when her son, E. H. Blaisdell, petitioned the Court Commissioner of that County for and obtained a writ of *habeas corpus* commanding the Sheriff to produce Mrs. Blaisdell together with his authority for her detention before the Commissioner on June 19, 1893, at his office in Fergus Falls to receive what should then and there be considered concerning her. The sheriff made return and set forth his warrant and produced all the proceedings in the Probate Court. The Commissioner adjudged that Mrs. Blaisdell was unlawfully detained and directed that she be discharged. From this determination the Sheriff appeals.

*M. J. Daly* and *E. E. Corliss*, for appellant.

*Haupt & Baxter* and *S. L. Pierce*, for the relator.

VANDERBURGH, J. A writ of *habeas corpus* was issued by the court commissioner of Otter Tail county to the sheriff of that county, commanding that officer to bring before him one Maria J. Blaisdell, represented to be in his custody, in order that due inquiry might be made into the cause and legality of her detention. The sheriff made due return that he held her in custody by virtue of a warrant of the Judge of Probate of the county, ordering her to be committed to the State Hospital for the Insane at St. Peter, and produced the original warrant.

The statute (1878 G. S. ch. 80, § 43) provides that the party brought before such officer may traverse the material facts in the return, or may allege any new matter to show that his imprisonment or detention is unauthorized, and thereupon such officer is to proceed in a summary way to hear such proof as might be presented in support or in opposition to such detention.

In this case, however, there was no pleading on the part of the petitioner to the return of the officer, and there were therefore no issues of fact for the court to try and determine upon evidence, and

the commissioner had no authority to receive or act upon evidence in the case outside of the return. Nor had he any authority, upon *habeas corpus*, to review the findings of the Probate Court, further than to inquire into questions of jurisdiction, nor to enter upon a re-examination of the question of insanity, upon evidence produced before him. Such officer can exercise no appellate jurisdiction, nor consider any errors or irregularities in the proceedings, judgment, or process of any competent court having jurisdiction. He can only inquire whether the judgment or process complained of is invalid because without or in excess of jurisdiction. *State ex rel. v. Sheriff of Hennepin Co.*, 24 Minn. 91. In this connection, it is proper to state that the provision in 1878 G. S. ch. 80, § 25, which denies the writ of *habeas corpus* to any person detained by virtue of the process or judgment of any competent tribunal clearly has no application to judgments or process void for jurisdictional defects. This provision, which is found in the statutes of other states, has a well-defined construction and meaning; and the accepted doctrine is enunciated in *People v. Liscomb*, 60 N. Y. 591: "A party held only by virtue of a judgment void for want of jurisdiction, or by reason of the excess of jurisdiction, is not put to his writ of error, but may be released upon *habeas corpus*."

It will not answer to say that a court having power to give a particular judgment can give any judgment, and that a judgment not authorized by law, or contrary to law, must be corrected by error. This would be trifling with the law, the liberty of the citizen, and the protection thrown about his person by the bill of rights and the constitution, and creating a judicial despotism. It would be to defeat justice, and nullify the writ of *habeas corpus* by the merest technicality, and the most artificial process of reasoning."

Upon the record before us, for reasons already stated, the only question open to the commissioner arose upon the return, and relates to the validity and sufficiency of the warrant under which the party was held. Before calling special attention to the form or terms of the warrant, however, it will be proper to refer briefly to the provisions of the statute in reference to the examination and commitment of insane persons. These provisions are found in the Probate Code, ch. 14. They are brief and summary in their character,

though an improvement in some respects upon the provisions of the General Statutes superseded by the Code. See *Knox v. Haug*, 48 Minn. 60, (50 N. W. 934.) It is therefore all the more important, in order to secure proper safeguards for the rights and liberty of persons alleged to be insane, that the directions of the statute be carefully followed.

Upon information filed, provision is made for bringing the party before the Probate Court, and thereupon the court is required to make an order directed to two reputable persons, one of whom is to be a duly-qualified physician; and such persons, in connection with the Probate Judge, shall constitute a jury "to examine the person alleged to be insane, and they shall ascertain the fact of sanity or insanity."

The persons designated in the order are required to take the prescribed oath before proceeding to the examination. Provision is also made for the examination of witnesses on both sides; and when the examination is ended "the jury shall forthwith make report of their findings in writing, which shall be filed in the Probate Court; their finding shall be that the person is 'sane' or 'insane.'" And if the person so examined is found to be insane the Probate Court shall order him to be committed, etc., and in such order shall direct that warrants be issued to the sheriff or other suitable person, who shall be authorized to convey such person to the hospital designated. It will be seen that the examination is to be conducted in the presence of the party, and to be by and in the presence of the jury, and that the party, or those representing him, must be allowed to take part in it, and to offer proper testimony in opposition to the information. And the examiners and judge must act as a committee or "jury" throughout, until the examination is completed, and finding made and filed.

It is obvious that the special finding in writing must be the act of "the jury," based upon the examination and inquiry by and in the presence of the jury, and not the act of the Judge, based in whole or in part on the report or recommendation of the examiners.

The statute requires that a specified series of questions shall be propounded and answered in the course of the examination of a person alleged to be insane, a copy of which is to be sent to the superintendent of the hospital for his information. But this is by

no means to constitute the sum of the examination, though part of the duties of the examiners in connection with it. The examination and finding are under the sanction of an oath. The jury must be satisfied upon such examination, including that of the patient and of the witnesses sworn in the case, of his insanity, before such finding can be reached, and in the conduct of the examination by the members of the jury, and to aid them in their deliberation and decision they are entitled to the professional skill and experience of the medical expert on the jury, as applied to the symptoms and evidence disclosed by the examination.

In this case the warrant under which the sheriff justifies is as follows:

"State of Minnesota, County of Otter Tail, ss.: Office of the Judge of Probate of said county. To the Superintendent of the St. Peter State Hospital: On the receipt of the certificate of two duly-qualified examiners in lunacy, appointed by me, certifying to the insanity of Maria J. Blaisdell, of Pelican Rapids, Minnesota, and recommending her commitment to a hospital for the insane, and having caused her to be fully informed of the proceedings taken in her case, and having (here state whether he personally saw alleged insane person, or took any further testimony) personally seen Mrs. Blaisdell, and taken further testimony in the case, it appears to me, upon full consideration of the certificate of the examiners, and other evidence, that Maria J. Blaisdell is insane, and a proper subject for custody and treatment in a hospital for the insane; and I so find, and hereby approve said examiners' certificate. Therefore, it is ordered that Maria J. Blaisdell be committed to the St. Peter State Hospital, there to be detained until discharged according to law. Davis Burbank, Judge of Probate."

In the absence of any other material or competent evidence, the decision of this case must turn exclusively upon the validity of this warrant. It will be observed that it is not a simple warrant of commitment, in the statutory form, but it also includes recitals of the order of the Judge, and the nature of the procedure and evidence on which it is based. These recitals are at least *prima facie* evidence of the facts, and show a clear departure from the requirements of the statute. It appears that the Judge determined the question upon the certificate of the examiners and other evidence, and there-

upon found the party insane. It needs no argument to show that this was not the finding of the jury required by the statute.

The warrant, therefore, on its face, appears to be wholly void and without jurisdiction, and the decision and order of the commissioner, though based by him on wrong reasons, were nevertheless correct, and must be affirmed.

(Opinion published 57 N. W. Rep. 206.)

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COLLINS, J. Upon reargument, January 17, 1894. At the former hearing of this case the attention of the court was not called to the fact that the provisions of the Probate Code (Laws 1889, ch. 46, subch. 14) relating to the commitment of insane persons to the state hospitals had been wholly superseded by certain sections of Laws 1893, ch. 5. Assuming that the provisions of the Probate Code on this subject were still in force, the court fell into the error of holding that the law had not been complied with, that there had been a complete departure from the requirements of the statute, and that the warrant under which Mrs. Blaisdell had been committed was on its face wholly void, and without jurisdiction. The inevitable result was the granting of respondent's petition for a rehearing. A question new to the case, and of the greatest importance, has now been raised by counsel for relator, namely, the constitutionality of those provisions in Laws 1893, ch. 5, which prescribe the course of procedure, and authorize the commitment of persons to public and to private hospitals for the insane. It is urged that these provisions violate the fourteenth amendment to the Federal constitution, and are in conflict with a similar article in our State constitution, forbidding that any person shall be deprived of his life, liberty, or property without due process of law. We have therefore to examine the provisions of the statute of 1893 in the light of adjudications as to what is, and what constitutes, "due process of law," in order to discover and determine whether constitutional rights have been encroached upon and invaded by means of this legislative enactment.

The first inquiry is as to what is "due process of law." In *Bardwell v. Collins*, 44 Minn. 97, (46 N. W. 315,) it was said that no complete or exhaustive definition of the term had ever been attempted

by the courts, because it was incapable of any such definition. All that could be done was to lay down certain general principles, and apply them to the facts of each case as they arise. Mr. Webster's exposition of the words, "law of the land," and "due process of law," viz.: "The general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial,"—was quoted; and then the court went on to say that, in judicial proceedings, "due process of law" requires notice, hearing, and judgment. These words, said the court, do not mean anything which the legislature may see fit to declare to be "due process of law," for there are certain fundamental rights which our system of jurisprudence has always recognized, which not even the legislature can disregard, in proceedings by which a person is deprived of life, liberty, or property, and one of these is "notice before judgment in all judicial proceedings." In commenting upon the difficulty of defining these words, it has been said that it is wisdom to leave the meaning to be evolved by the gradual process of judicial inclusion and exclusion, as the case presented for decision shall require. *Davidson v. New Orleans*, 96 U. S. 104. But it may be stated generally that due process of law requires that a party shall be properly brought into court, and that he shall have an opportunity, when there, to prove any fact which, according to the constitution and the usages of the common law, would be a protection to him or to his property. *People v. Board of Supervisors*, 70 N. Y. 228. Due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing, or an opportunity to be heard, is absolutely essential. "Due process of law" without these conditions cannot be conceived. *Stewart v. Palmer*, 74 N. Y. 183.

It follows that any method of procedure which a legislature may, in the uncontrolled exercise of its power, see fit to enact, having for its purpose the deprivation of a person of his life, liberty, or property, is in no sense the process of law designated and imperatively required by the constitution. And while the state should take charge of such unfortunates as are dangerous to themselves and to others, not only for the safety of the public, but for their own amelioration, due regard must be had to the forms of law and to

personal rights. To the person charged with being insane to a degree requiring the interposition of the authorities and the restraint provided for, there must be given notice of the proceeding, and also an opportunity to be heard in the tribunal which is to pass judgment upon his right to his personal liberty in the future. There must be a trial before judgment can be pronounced, and there can be no proper trial unless there is guaranteed the right to produce witnesses and to submit evidence. The question here is not whether the tribunal may proceed in due form of law, and with some regard to the rights of the person before it, but, rather, is the right to have it so proceed absolutely secured? Any statute having for its object the deprivation of the liberty of a person cannot be upheld unless this right is secured, for the object may be attained in defiance of the constitution, and without due process of law.

Let us now turn to the statute in question. It must be observed at the outset that private, as well as public, hospitals are within its terms, and for this reason, if for no other, the rights of the citizen should be closely guarded. Laws 1893, ch. 5, § 17, requires that every person committed to custody as insane must be so committed in the manner thereafter prescribed. Section 19 provides that whenever the Probate Judge, or, in his absence, the court commissioner, shall receive information in writing (the form being given) that there is an insane person in his county needing care and treatment, he shall issue what is called a "commission in lunacy" (the form thereof being prescribed) to two physicians, styled "examiners in lunacy." This section permits the filing of an information not even sworn to by anybody. That it has opened the door to wrong and injustice—to the making of very serious and unwarranted charges against others by wholly irresponsible and evil-minded persons—is evident, although the method of instituting the proceedings does not affect the validity of the act. The commission directs the two physicians designated, who, under section 18, must now possess certain qualifications, to "examine" the alleged lunatic, and certify to the Probate Judge or court commissioner, within one day after their examination, the result thereof, with their recommendation as to the special action necessary to be taken. The form of this certificate and recommendation is laid down in section 20. This certificate must be duly sworn to or affirmed before the officer issu-



ing the commission. Section 21. If (section 19) the examiners certify that the person examined is sane, the case shall be dismissed. If they disagree, the officer shall call other examiners, or take further testimony. If they certify the person to be insane, and a proper subject for commitment, for any of the reasons specified in section 17, it is made the duty of the officer to visit the alleged insane person, or to require him to be brought into court; "but he shall cause him to be fully informed of the proceedings being taken against him." If the officer deems it advisable, he may call other examiners, or take further testimony, and in all cases, "before issuing a warrant of commitment," the county attorney shall be informed, and it is made his duty to take such steps as are deemed necessary to protect the rights of such person. If satisfied that the person is insane, and that the reason for his commitment is sufficient, under the provisions of the act, the Probate Judge or the court commissioner approves the certificate of the examiners, and issues an order or warrant in duplicate, committing him to the custody of the superintendent of one of the state hospitals, or to the superintendent or keeper of any private hospital or institution for the insane, which, under the same law, has been duly licensed. This order or warrant may be executed by the sheriff or by a private individual, and through it the person named therein is placed in the custody of the superintendent or keeper to whom it may have been directed. There are some other provisions in respect to these commitments, but they have no bearing on the questions now before us, and we now reach a consideration of the controlling provisions of the statute. The commission issues to the examiners, and they are authorized and directed to "examine" the alleged lunatic. Their examination is not made under oath. It may be formal or informal, as they choose, and the person under examination may not have the slightest idea that he is the subject of inquiry or investigation. The examination may be at any place where the subject can be found, or at a place convenient for the examiners. It may be public or private, and, judging from the questions found in the form to be answered by the examiners, it may consist simply in observing the alleged lunatic, and in making inquiries of him or of his acquaintances, or, for that matter, accepting common street gossip. To illustrate: In the certificate signed by the physicians who made

this examination is the answer to a most important question, viz.: "Has the patient shown any disposition to injure others?" The answer is: "Yes. It is reported that she threatens to shoot, carries firearms, and did shoot at one person passing, not knowing whom."

When this examination, of which the subject need not be informed, and in which he takes no part, is completed, the examiners are required to make a verified written report and recommendation, and on this the officer may commit without any other or further act, except that he must see the subject, either in or out of court, informing him fully of the proceedings, and must also notify the county attorney of what is going on. Not until after the examination, report, and recommendation, upon which the officer may commit, if he so chooses, need there be any notice whatsoever to the person charged with being a proper subject for the insane asylum, nor need the county attorney be advised of the proceeding. If personal rights are of any consequence, and if they need protection at any time, such notice should precede the examination, not follow it. But, aside from this serious defect in the law, it will be seen that there is no provision which assures to the accused a trial at any time, either before or after notice, under the forms of law; no provision which guaranties to him a judicial investigation and a determination as to his sanity. The officer before whom the inquiry is pending is nowhere required to conduct his examination with the least regard to the rights of the person charged with being insane,—his right to exercise his faculties without unwarranted restraint, and to follow any lawful avocation for the support of life.

Nor is the officer obliged to hear a particle of testimony, although he is at liberty so to do. The accused or the county attorney might appear before him with an army of volunteer witnesses; but if their testimony was received or heard, or if there was the slightest approach to a trial, it would be through the grace of the officer, not as a matter of right to the person whose personal liberty is jeopardized by the proceeding. We are not speaking of what every honorable and humane officer would do when a case was before him, but of what the statute will permit an officer to do.

Further examination of this enactment need not be made, for enough has been said to establish its invalidity, and to indicate what outrages might be perpetrated under it. The objection to

such a proceeding as that authorized by this statute does not lie in the fact that the person named may be restrained of his liberty, but in allowing it to be done without first having a judicial investigation to ascertain whether the charges made against him are true; not in committing him to the hospital, but in doing it without first giving him an opportunity to be heard.

We are compelled to the conclusion that the enactment of the sections referred to is unconstitutional, because they allow and sanction a denial of the protection of the law, and the deprivation of personal liberty without due process of law. But we do not intend to intimate that in this case the upright and conscientious Judge of Probate before whom it was pending acted arbitrarily, or that he adhered to the letter of the statute, disregarding the rights or requests of Mrs. Blaisdell or her friends, when, after the examination, report, and recommendation, she appeared before him. There is nothing to indicate such a course. As we have shown, the statute is so constructed that the opportunity to be heard in defense is not guarantied to the person charged. It is not framed so as to compel a hearing before condemnation or a trial, under the general forms of law, before judgment is pronounced. Where it is plain that legislation upon any subject is in conflict with constitutional provisions, the duty of the court is obvious, and must be performed, whether the interests of a large number, or of a certain class, of people are involved, or the rights of a single citizen.

The provisions of chapter 5, *supra*, on this subject, being invalid, those which they were designed to supersede, found in the Probate Code, are in force, and must be observed. As stated in the former decision, they were not; and, as a consequence, the conclusion heretofore reached is adhered to.

(Opinion published 57 N. W. Rep. 794.)

**JACOB L. SCHUCH vs. WINONA & ST. PETER RAILROAD CO.**

Submitted on briefs Nov. 20, 1893. Affirmed Dec. 18, 1893.

No. 8469. \*

**Order denying change of venue, reviewed on appeal from the judgment.**

An order granting or denying a motion to change the place of trial may be reviewed on appeal from the judgment.

**Residence of railroad Co.**

In an action against a railroad company in this state, any county in which it has an office, agent, or place of business is to be deemed the residence of such company.

**Same rule as to venue in appeals as in original actions.**

And the same rule applies, as respects the place of residence of such corporations, on applications to change the place of trial in cases appealed from Justice's Court to the District Court as in actions brought in the last-named court.

Appeal by defendant, the Winona and St. Peter Railroad Company, from a judgment of the District Court of Brown County, *B. F. Webber, J.*, entered July 14, 1893, against it for \$87.19.

The plaintiff, Jacob L. Schoch, commenced this action February 21, 1893, in a Justice's Court at New Ulm to recover \$44 for his services as surgeon and physician in treating one Joe Woratchke, a servant of defendant, injured while in its service. He had judgment for \$44 and costs. Defendant appealed to the District Court on questions of both law and fact. It then moved the Court on notice and affidavits to change the place of trial of the action from Brown to Winona County on the ground that it was a domestic corporation and its general offices and principal place of business then were and for five years had been at Winona, and that the residence of the corporation was at the last named place. The Court denied the application and the issues were tried in Brown County. Plaintiff had a verdict for \$29. Judgment was entered and the Company appealed to this Court and assigned as error the refusal to change the place of trial.

*Brown & Abbott*, for appellant.

Every domestic corporation has some locality where its principal office or place of business is established. It may be properly said to "reside" at such locality, within the meaning of the practice act, fixing the place of trial. *Louisville, C. & C. R. Co. v. Letson*, 2 How. 497; *Jenkins v. California Stage Co.*, 22 Cal. 537; *Connecticut P. R. Ry. Co. v. Cooper*, 30 Vt. 476; *Androscoggin Ry. v. Stevens*, 28 Me. 434; *United States v. Southern Pac. R. Co.*, 49 Fed. Rep. 297.

*Lind & Hagberg*, for respondent.

The residence of a corporation for the purpose of suit is not confined to the place where its principal office or place of business is located. A corporation resides wherever it exercises its franchise and conducts its corporate enterprise by an authorized agent or officer. It dwells where its business is done. It is present where it is engaged in the prosecution of the corporate enterprise. *Rhodes v. Salem, T. & C. B. Corp.*, 98 Mass. 95; *Mooney v. Union Pacific Ry. Co.*, 60 Ia. 346; *Richardson v. Burlington, &c., R. Co.*, 8 Ia. 260; *Buffalo & S. S. R. Co. v. Supervisors*, 48 N. Y. 93; *Harding v. Chicago & A. R. Co.*, 80 Mo. 659; *Baltimore & O. R. Co. v. Glenn*, 28 Md. 287; *Cowardin v. Universal Life Ins. Co.*, 32 Gratt. 445; *Ormsby v. Vermont C. M. Co.*, 56 N. Y. 623; *United States v. Southern Pac. R. Co.*, 49 Fed. Rep. 297; *Jones v. Swank*, 54 Minn. 259.

VANDERBURGH, J. This action was brought and tried in Justice's Court, in the county of Brown. The defendant appealed from the judgment to the District Court in that county, upon questions of both law and fact. It is admitted that the defendant's railway runs through Brown county, and it has a station and a freight and ticket agent at New Ulm, in that county.

The case was properly tried in that county, and the District Court regularly acquired jurisdiction thereof upon the appeal. Thereupon, the defendant demanded that the place of trial be changed from the county of Brown to the county of Winona, on the ground that the defendant's place of residence must be deemed to be in the

latter county because its general offices and place of business are located in that county.

The motion to change the place of trial for that cause having been denied the defendant alleges error on that ground, on appeal from the judgment of the District Court to this court. Such order may be reviewed on appeal from the judgment. *Wilson v. Richards*, 28 Minn. 339, (9 N. W. 872; ) *Carpenter v. Comfort*, 22 Minn. 539; *Hinds v. Backus*, 45 Minn. 172, (47 N. W. 655.)

Laws 1889, ch. 161, § 2, provides for the transfer of actions appealed from Justice's Court, when the defendant is not a resident of the county where the Justice resides. The same statute provides for the filing of an affidavit showing the residence of the defendant in another county, and the action may be transferred by order of the District Court.

Upon the application for such order in this case, the question was necessarily raised whether the defendant, by virtue of its local offices and agents in Brown county, must not be deemed a resident of that county. In our judgment, the question may be summarily disposed of. The trial in the Justice Court could only be in Brown county, where the court acquired jurisdiction by force of the statute providing for the service of process upon such corporations. 1878 G. S. ch. 66, § 62. Had the action been commenced in the District Court of Brown county, as it might have been, the place of trial must have also remained in Brown county, because, by 1878 G. S. ch. 66, § 49, that county must have been deemed the place of residence of the defendant. The courts will not hesitate to hold that the same rule should be applied to cases appealed from Justice's Court, and the statutory definition of the residence of corporations in section 49, above referred to, should be applied in both cases.

The court was right in refusing the application, and the judgment should be affirmed.

(Opinion published 57 N. W. Rep. 208.)

v.55M.—31

**JOSEPH HAMILTON vs. WILLIAM F. WOOD.**

Argued Nov. 9, 1898. Affirmed Dec. 13, 1898.

No. 8446.

**Interlocutory injunction when permanent one is not demanded.**

It is not necessary, in all cases where a temporary injunction is sought in an action, that the plaintiff should ask for a permanent injunction in his complaint. Other equivalent relief may be sought, appropriate to the nature of the case, and it is enough that it be made to appear that the defendant is threatening to do some act in violation of plaintiff's rights, in respect to the subject of the action, and tending to render the judgment ineffectual.

**Interlocutory injunction after answer denying all equities.**

It is the general, but not inflexible, rule to refuse to allow or continue an injunction, after answer denying all the equities of the complaint. There is room for the exercise of a sound judicial discretion in such cases. *Held*, that the circumstances of this case are such as to call for the exercise of such discretion.

**Injunction to prevent cloud upon title.**

The prevention of a cloud upon title is properly a branch of equity jurisdiction; and where a party has succeeded to the title of one against whom an action had been commenced, and afterwards settled, but which nevertheless culminated in a judgment which was an apparent, though invalid, lien on his property, *held*, that he was not confined to his legal remedy, to apply for relief in that action, but that he might have an injunction in the proper form of action to restrain a threatened sale upon execution issued upon such judgment.

**Suit to determine the validity of a judgment.**

The inquiry into the validity of such judgment lien and execution properly falls within the jurisdiction of the court in the injunction suit.

**Fraudulent participation in instituting the first action.**

*Held*, also that the facts set up by the defendant in respect to the origin of the action, in which such judgment was rendered, and the plaintiff's connection therewith, which are alleged to have been fraudulent, do not invalidate the subsequent alleged agreement between the plaintiff and defendant herein for the settlement and dismissal of that action.

**Relief may be granted although the subject-matter grew out of a fraud.**

A court of equity will not refuse relief merely because the subject-matter in respect to which relief is asked may have grown out of a

fraudulent transaction, and it will interfere to prevent the active enforcement of an illegal contract, though it would not give to either party any affirmative relief or benefit growing out of such contract.

Appeal by defendant, William F. Wood, from an order of the District Court of Hennepin County, *Seagrave Smith, J.*, made May 6, 1893, granting an injunction restraining a sale pending this action.

The defendant constructed a house on lot four (4) in block forty nine (49) in St. Louis Park Centre, for Ida F. Schmidt, for \$1,035. The plaintiff, Joseph Hamilton, advanced this money for the purpose and was to have a mortgage on the house and lot for the amount. After the house was built and the money paid she and her husband, August C. Schmidt, refused to execute and deliver the mortgage or repay the money. Thereupon plaintiff requested defendant to file a lien upon the property for the contract price, and he did so and commenced an action to foreclose it for plaintiff's benefit. Before the time to answer in that action expired plaintiff settled with the Schmidts and purchased of them the house and lot and on August 15, 1892, took a deed thereof. Plaintiff then notified Wood of the purchase and paid him the costs he had incurred in the lien suit and he agreed to dismiss it. But he failed to do so and some three months thereafter caused judgment for foreclosure and sale to be entered, on default, without the knowledge or consent of plaintiff. Afterwards in March, 1893, he caused a certified copy of the judgment to be issued to the Sheriff. Under it, the Sheriff advertised the house and lot for sale on May 8, 1893, to pay the judgment, with interest and costs. The plaintiff on April 18, 1893, discovered the facts and brought this action against Wood for a temporary injunction and to have the judgment satisfied and for such other relief as should seem to the Court equitable. His complaint stated these facts and was supported by his affidavit. On them, he moved the Court, on notice, for a temporary injunction restraining the sale until the final determination of this action. Wood made answer and read it in opposition to the motion. In it he admitted most of the facts above stated, but denied that the plaintiff paid the \$1,035, or the costs of the foreclosure suit and also denied that he agreed to file the lien or foreclose it for plaintiff's benefit, or to dismiss that action. The Court granted the temporary injunction and defendant appeals.



*Savage & Purdy*, for appellant.

Plaintiff was not entitled to the temporary injunction, because he failed to demand a permanent injunction in his complaint. 1878 G. S. ch. 66, § 200; *Hovey v. McCrea*, 4 How. Pr. 31; *Olssen v. Smith*, 7 How. Pr. 481.

Proceedings to vacate this judgment can only be taken in the original action; *Wieland v. Shillock*, 23 Minn. 227; s. c. 24 Minn. 345; *Ede v. Hazen*, 61 Cal. 360; *Parker v. Bledsoe*, 87 N. C. 221; *Mastick v. Thorp*, 29 Cal. 444; *French v. Shotwell*, 5 Johns. Ch. 554.

No relief will be granted against a judgment where the party could have protected himself in the original suit. 3 Pomeroy Eq. J. § 1361; *Hopkins v. Medley*, 99 Ill. 509; *Ede v. Hazen*, 61 Cal. 360; *Parker v. Bledsoe*, 87 N. C. 221; *Johnston v. Paul*, 23 Minn. 46.

The only possible escape that plaintiff could have, is, that the judgment was entered by fraud, accident or mistake. But to avail himself of this, it must be unmingled with any fault or negligence of himself. *Freeman*, Judg. § 502; *Shufeldt v. Gandy*, 34 Neb. 32; *Ratliff v. Stretch*, 130 Ind. 282; *Sargeant v. Bigelow*, 24 Minn. 370.

Admitting the complaint to be true, the facts stated show an agreement to do an unlawful and criminal thing and a court of equity will not interfere to secure to one of the conspirators the benefit of the unlawful transaction as against the other. *Bishop Contracts*, § 489; *Elder v. First National Bank*, 12 Kans. 238; *Harrington v. Bigelow*, 11 Paige, 349; *Creath v. Sims*, 5 How. 192; *Palmer v. Harris*, 60 Pa. St. 156; *Weed v. Little Falls & D. R. Co.*, 31 Minn. 154; *Blystone v. Blystone*, 51 Pa. St. 373.

All the equities of the plaintiff are denied by the answer. No injunction will be granted under such circumstances. *McCartney v. Cassidy*, 141 Pa. St. 453; *Montgomery v. McEuen*, 9 Minn. 103; *Armstrong v. Sanford*, 7 Minn. 49; *Moss v. Pettingill*, 3 Minn. 217; *McCulla v. Beadleston*, 17 R. I. 20.

*A. E. Helmick*, for respondent.

The temporary injunction prayed for in the complaint is within the provisions of 1878 G. S. ch. 66, § 200. *Wilmington S. M. Co. v. Allen*, 95 Ill. 288; *Reynell v. Sprye*, 1 De Gex, M. & G. 660. This new action is proper. Plaintiff was not required to intervene in the

foreclosure suit to obtain the relief he seeks. 3 Pomeroy, Eq. J. § 1363.

All of the plaintiff's acts were proper and legal, and injured no man. No fraud was perpetrated against the Schmidts for the reason that the lien was filed for the exact amount due, and no excess was at any time attempted to be collected. The only fraudulent acts were those of defendant in proceeding to foreclose a lien already satisfied. *McBlair v. Gibbes*, 17 How. 232; *Brooks v. Martin*, 2 Wall. 70.

Upon the coming in of an answer denying the equities of the complaint, the Court in its discretion can either grant or deny the application. Having once granted an interlocutory injunction, its order will not be disturbed on appeal unless a clear abuse of discretion can be shown. *Myers v. Duluth Transfer Co.*, 53 Minn. 335; *New v. Bame*, 10 Paige, 502; *McCorkle v. Brem*, 76 N. C. 407; *Jones v. Brandon*, 60 Miss. 556; *Conkey v. Dike*, 17 Minn. 457; *Stees v. Kranz*, 32 Minn. 313; *Dickerson v. Hayes*, 26 Minn. 100; *O'Brien v. Oswald*, 45 Minn. 59.

The action is to prevent the cloud upon plaintiff's title which would be caused by a sale of the premises under the judgment. *Pettit v. Shepherd*, 5 Paige, 493; *Christie v. Hale*, 46 Ill. 117; *Irwin v. Lewis*, 50 Miss. 363; *Hinkley v. Haines*, 69 Me. 76; *Conkey v. Dike*, 17 Minn. 457; *Hanson v. Johnson*, 20 Minn. 194; *Barton v. Drake*, 21 Minn. 299; *Maloney v. Finnegan*, 38 Minn. 71; *Fusler v. Beard*, 39 Minn. 32.

VANDERBURGH, J. By his complaint in this action the plaintiff seeks the equitable interference of the court to restrain the sale of certain real property under a judgment for the foreclosure of a mechanic's lien filed against the same by defendant, which judgment plaintiff alleges was fraudulently entered after the lien was settled by plaintiff. Upon the facts stated plaintiff asks an injunction restraining the proceedings, and a threatened sale under the judgment, pending the action, and for the dismissal of all proceedings for the enforcement of the lien, and the satisfaction of the same. The defendant appeals from the order granting an injunction.

1. Under 1878 G. S. ch. 66, § 200, it is not necessary in all cases in which a temporary injunction is sought to ask for a permanent injunction in the complaint, for other appropriate relief may be asked, substantially equivalent. It is enough that it be made to appear that the defendant is threatening to do some act in violation of plaintiff's rights in respect to the subject of the action, and tending to render the judgment ineffectual. Such is the case of a suit to set aside or cancel an invalid or satisfied mortgage upon which a foreclosure sale is threatened. And besides, in this case defendant has appeared in the action, and the court is authorized to grant any final relief consistent with the case made by the pleadings. This objection to the complaint, therefore, cannot be sustained.

2. The application for the injunction was heard upon the complaint and affidavit of the plaintiff and the sworn answer of the defendant. The defendant insists that it was error for the court to allow the writ, because the answer denies all the equities of the complaint.

While it will be conceded that the general rule is as the plaintiff contends, yet it is not inflexible, but it is a matter largely in the sound judicial discretion of the court, whether it will retain or set aside an injunction upon the hearing, depending upon the nature of the case, and the attendant circumstances, especially in cases of this kind, where the delay of the sale until the hearing would work comparatively little injury to the substantial rights of the defendant, as compared with the inconvenience and embarrassment it might cause to the plaintiff. *Stees v. Kranz*, 32 Minn. 313, (20 N. W. 241;); *High, Inj.* §§ 1508, 1509; *O'Brien v. Oswald*, 45 Minn. 59, (55 N. W. 140.) We are of the opinion that the discretion of the court was not abused in this instance.

3. Another objection urged is that plaintiff had an adequate legal remedy; that he ought to have applied for relief in the original action for the enforcement of the lien; that he might have procured a stay of proceedings, and moved to set aside the judgment, and been admitted to defend in that action. It is undoubtedly true that, having succeeded to the title of the property in question, he would have had a standing in court to apply for such relief.

But plaintiff was not confined to this remedy. The equitable remedy to restrain by injunction a sale which is unwarranted and

inequitable, and which would create a cloud upon the title of the plaintiff, is well established, and is clearly contemplated by 1878 G. S. ch. 66, §§ 200, 204; *Conkey v. Dike*, 17 Minn. 460-465, (Gil. 434.) "The prevention of a cloud upon title is a salutary branch of the jurisdiction of equity recognized by all the authorities, and founded upon the clearest principles of right and justice." High, Inj. § 372.

In order to form a basis for the relief by injunction sought there must be a suit brought, and the plaintiff must, of course, show that the threatened sale is unlawful and unauthorized. This the complaint in this case shows. It substantially appears thereby that the defendant had erected a house upon the premises for the owner thereof, and at the instance of the plaintiff proceeded to file a claim for a statutory lien for the cost thereof, the amount of which had already been advanced to him by the plaintiff; and brought an action to foreclose the same. The owner made no contest, and shortly afterwards the plaintiff purchased the property, and thereupon, it is alleged, made full settlement with the defendant, including the costs and expenses of the action, in consideration whereof the defendant agreed to satisfy the lien, and dismiss the suit. This, however, the defendant failed to do, but several months thereafter secretly caused judgment to be entered by default, and afterwards caused the premises to be advertised for sale in pursuance thereof. The entry of judgment after the claim was settled was in violation of the rights of the plaintiff, and a fraud upon him. *Gates v. Steele*, 58 Conn. 316, (20 Atl. 474;) 3 Pom. Eq. Jur. p. 2104. These allegations afford ample justification for the injunction, and the inquiry into the validity of the judgment and lien properly falls within the jurisdiction of the court in the injunction action.

4. But, in addition to the facts already stated, the complaint also shows that the plaintiff had in the first instance paid defendant the cost of the house we have referred to, in pursuance of an agreement between all the parties interested, under which the owner was in consideration thereof to secure plaintiff for the sum so advanced, but which he afterwards refused to do; and the complaint proceeds: "That thereupon plaintiff entered into a certain agreement with defendant, whereby it was understood and agreed by plaintiff and defendant that defendant should file a mechanic's lien upon said premises for the total cost of said house, and should

proceed to have said lien foreclosed, for the protection, benefit, security of, and in trust for, plaintiff, to protect said plaintiff for the said sum of money so advanced, which said proceedings were to be conducted in the name of defendant; that, in pursuance of said agreement, defendant caused mechanics' liens to be filed against the premises" as above stated. And subsequently plaintiff bought the property of the defendants in the lien suit, and entered into the arrangement for the settlement of the lien and dismissal of the proceedings already mentioned. This scheme or device to save the plaintiff's claim the defendant insists was dishonest, and so affected the whole subsequent transaction between plaintiff and defendant in respect to the settlement of the suit that a court of equity will not interfere to aid either party, but will leave them as it finds them. The facts stated do not, however, bring this case within the class of cases counsel refer to. While the law did not give this plaintiff any such remedy as he was seeking to avail himself of through the defendant's lien, and would have interfered to protect the owner against it, yet the debt was an honest one, it seems; and the question relates rather to the remedial rights of the parties than to the inherent immorality or unlawfulness of the transaction. But, under the altered circumstances, after plaintiff became the owner, there certainly could be nothing in the subject-matter invalidating the new agreement with the defendant, or requiring the application of the maxim "*in pari delicto*," etc. Equity will not interfere or refuse to interfere merely because the subject-matter in respect to which relief is asked may have grown out of a fraudulent or illegal transaction. *McBlair v. Gibbes*, 17 How. 237; *Brooks v. Martin*, 2 Wall. 81. On the contrary, it would be highly inequitable to allow the defendant to enforce payment a second time. Equity will interfere, even in the case of illegal contracts, to restrain their active enforcement, upon the same principle that under other circumstances they may be defended against at law, though it would not give to either party any relief or benefit growing out of the contract. 2 Pom. Eq. Jur. § 940.

This disposes of all the questions in the case which we deem material to be considered. Order affirmed.

(Opinion published 57 N. W. Rep. 208.)

ALBERT RICHARDSON *et al.* vs. JAMES McLAUGHLIN *et al.*

Argued by appellant, submitted on brief by respondent, Nov. 3, 1893. Affirmed Dec. 13, 1893.

No. 8454.

**Practice on making others parties with the sheriff under 1878 G. S. ch. 66, § 155.**

Where a sheriff is sued in trover after levy under attachment or execution upon property claimed by the plaintiff in the suit, and upon the sheriff's application, pursuant to 1878 G. S. ch. 66, § 155, an order is made directing the obligors in an indemnity bond executed to him under section 154 to be impleaded with him, it is not necessary for the plaintiff to amend his complaint by setting up facts showing the nature of their liability as indemnitors of the sheriff. That is for the sheriff to do in his answer. It is enough that they be made parties by the service of the proper summons and notice, and they may then plead to the plaintiff's complaint, and to the answer of the defendant sheriff, as they may be advised.

Appeal by defendants, C. Gotzian & Co., George W. Freeman, Isaac H. Arthur and James W. Warren, from an order of the District Court of Pine County, *F. M. Crosby, J.*, made April 12, 1893, overruling their demurrer to the complaint.

C. Gotzian & Co., a corporation, recovered a judgment in the District Court of Ramsey County against J. W. Plummer and F. B. Richardson, retail merchants at Sandstone, and issued execution thereon and placed it for service in the hands of James McLaughlin, Sheriff of Pine County. He levied on a stock of goods. Albert Richardson and M. C. Gates appeared and claimed the goods. The Sheriff demanded indemnity against such claim. Thereupon C. Gotzian & Co., as principal and George W. Freeman, Isaac H. Arthur and James W. Warren, as sureties, made and delivered to him a bond of indemnity pursuant to 1878 G. S. ch. 66, § 154. The Sheriff then sold the goods and the claimants Albert Richardson and M. C. Gates brought this action against the Sheriff to recover the value of the goods sold. He answered, denying that they owned the goods. The Sheriff then moved the Court, on notice and affidavit of the facts, and obtained an order that C. Gotzian & Co. and the sureties in its bond, be made defendants in the action with him

and be served with summons to answer. In compliance with the order the plaintiffs then served on C. Gotzian & Co. and the sureties, a copy of it and a notice to answer the complaint on file within twenty days, or on default they would apply to the Court to have the amount they were entitled to recover, ascertained by the Court, or under its direction, and take judgment for the amount so ascertained. The only complaint on file was the one wherein Albert Richardson and M. C. Gates were plaintiffs and James McLaughlin, the Sheriff, was the defendant. C. Gotzian and Co. and the sureties demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action against them. The trial Court overruled the demurrer with leave to answer in twenty four hours. C. Gotzian & Co. and the sureties at once appealed to this Court.

*Morphy, Ewing, Gilbert & Ewing*, for appellants.

The order to implead was never properly obeyed. The complaint was not amended. The complaint charges no liability upon C. Gotzian & Co. or the sureties, nor does it ask any relief against them. *Tullis v. Orthwein*, 5 Minn. 377; *Western R. Co. of Minnesota v. DeGraff*, 27 Minn. 1; *Penfield v. Wheeler*, 27 Minn. 358; *Hooper v. Balch*, 31 Minn. 276.

*L. H. McKusick*, for respondents.

VANDERBURGH, J. Plaintiffs sue defendant McLaughlin, sheriff of Pine county, in trover for the seizure and conversion of a stock of goods claimed by them, and levied on by him as the property of C. W. Plummer & Co., upon an execution issued against them, upon a judgment recovered by C. Gotzian & Co. After answer, defendant's attorneys procured an order of the court directing that certain parties, obligors in a bond of indemnity executed on behalf of C. Gotzian & Co. to the defendant McLaughlin in pursuance of 1878 G. S. ch. 66, § 154, be joined in the suit as codefendants, as provided for in section 155 of the same chapter. Thereafter the plaintiffs' attorney served a copy of the order upon the obligors in the indemnity bond, with a notice in the form of a summons addressed to them, in which they were required to answer the original com-

plaint in the action, on file with the clerk, within twenty days, etc. Instead of answering, they appeared, and demurred to the complaint on the ground that it did not state a cause of action against them.

It is admitted that it was sufficient as against defendant McLaughlin, but their counsel insist that, as the complaint was not made in an action against them, it was necessary to file an amended complaint.

Their relation to the suit is fixed by the statute in pursuance of which they are brought into it. The summons we have referred to does bring them into the suit, and, in so far as the plaintiffs are concerned, the claim they are required to defend against is that made against the defendant sheriff in the complaint filed.

The plaintiffs did not choose to join the obligors in the bond in the principal action, but elected to proceed against the sheriff alone; and the plaintiffs in the execution are liable over to him. Independently of the statute, they would, upon due notice, have been obliged to assume the burden of the defense, and have been concluded by the judgment, in an action by him against them, because answerable over to him. *Leshner v. Getman*, 30 Minn. 330, (15 N. W. 309;) *Westfield v. Mayo*, 122 Mass. 109.

In some states the same result is reached in a summary way, after judgment against the sheriff, by motion for judgment against the sureties for the amount recovered, with costs. Code Civil Proc. Cal. § 1055.

Under our statute the indemnitors are impleaded on the motion of the sheriff, and, of course, for his benefit; and his and their rights and obligations are to be adjusted in the same suit. The plaintiffs are not bound to amend their complaint by setting up the facts upon which the sheriff predicates the liability of his indemnitors to him; hence it devolves upon him to set up these facts in his answer, unless this is waived by the sureties, and thereupon they will be entitled to litigate the claims of the plaintiffs and their codefendant in the same action. *Howe v. Spalding*, 50 Minn. 157, (52 N. W. 528.)

The proper practice is indicated in *Leshner v. Getman*, 30 Minn. 326, 329, (15 N. W. 309.) Since the summons was directed to the defendants, and a copy of the order directing them to be made par-



ties was served with it, the mere fact that the title of the action in the complaint was not formally amended was not ground of demurrer.

Order affirmed.

(Opinion published 57 N. W. Rep. 210.)

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C. AULTMAN & Co. *vs.* JOHN A. TORREY.

Argued by appellant, submitted on brief by respondent, Nov. 16, 1893. Affirmed  
Dec. 18, 1893.

No. 8334.

A breach of warranty may be a defense.

A breach of warranty may be the subject of counterclaim, or it may be set up as a defense by way of recoupment, in an action for the purchase price of property sold with warranty.

Such a defense is not barred by the statute of limitation of actions.

The statute of limitations does not run against the defendant's right to interpose such defense, and such right must be held to survive and continue as long as the vendor's right of action upon the contract.

Appeal by plaintiff, C. Aultman & Co., a corporation, from a judgment of the District Court of Brown County, *B. F. Webber, J.*, entered October 11, 1892, for defendant for his costs.

On August 8, 1884, the plaintiff sold and delivered to defendant, John A. Torrey, a harvesting and binding machine, and warranted it to do good work, that it was made of good material, not liable to get out of order, of light and easy draft, and would not miss binding bundles. Torrey gave plaintiff his two promissory notes for the price; one for \$125 and interest, due November 1, 1885, and the other for \$100 and interest, due November 1, 1886. This action was commenced October 20, 1891, upon these notes. The defendant answered stating these facts and a breach of the warranty whereby he sustained damages to the full amount of the notes and he asked judgment that plaintiff take nothing and that he recover costs. Plaintiff for reply denied the breach of the war-

ranty and the damages, and also averred that defendant's claim of damages did not accrue within six years next before the commencement of the action.

The parties then stipulated as to the facts and waived a jury, and agreed that if the defence or counterclaim was not barred, defendant should have judgment and submitted the matter to the Court. Findings were made and judgment entered that plaintiff take nothing by its action and pay costs taxed at \$16. Plaintiff appeals.

*Harrison & Noyes and E. E. Smith, for appellant.*

*George W. Somerville, for respondent.*

VANDEBURGH, J. The plaintiff sues to recover upon notes which were dated August 8, 1884, and payable November 1, 1885, and November 1, 1886. The action was brought in October, 1891. The notes were given for the price of a harvester sold by plaintiff to defendant with warranty when they were given, and it is admitted that there has been a breach of the warranty for more than six years, and that the damages suffered by the defendant by reason of such breach of warranty are equal to the amount of the notes sued on. The breach of warranty was set up by defendant as a defense, and by way of recoupment of plaintiff's damages from defendant's failure to pay the purchase price represented by the notes. Plaintiff claims as a legal proposition that the statute of limitations had run against any claim of damages or right to recoup the same in this action. The correctness of this proposition the trial court did not assent to, and ordered judgment for the defendant. It is the only question to be considered on this appeal.

A party defendant may plead as a defense matter that under other circumstances would be the subject of a counterclaim, or an independent cause of action. A counterclaim must be pleaded as such, and not as a defense. *Broughton v. Sherman*, 21 Minn. 431.

Recoupment or reduction of a demand is said to arise where there is an action upon a contract, and there has been a breach of the contract, or some divisible part of it, or obligation connected with it. *Anderson, Law Dict. in loc.* This meets the requirements of this case. Upon the facts admitted, defendant was entitled to a reduction of the amount of the contract price by reason of plaintiff's breach of the contract, and, his damages being admitted to be equal

to the entire purchase price, he is entitled to plead the same as a complete bar to plaintiff's action. *Wilson v. Reedy*, 33 Minn. 504, (24 N. W. 191.) Such a recoupment by way of defense or reduction of the plaintiff's claim must be held to survive and continue as long as his cause of action.

Any other rule would result in great injustice; and, besides, it is sufficiently clear that the statute of limitations was not intended to include such cases.

The right is inseparable from the nature of the contract, and, as long as that subsists as the basis of the plaintiff's claim, so long the right to defend against it for the plaintiff's breach of the contract, by way of recoupment or otherwise, must remain. So that recoupment, as properly defined, and as it is to be applied in this case, amounts practically to a partial or complete defense, as much as would a partial or complete failure of consideration. *Wilson v. Reedy, supra*; *Pomeroy, Rem. (2d Ed.)* p. 745.

As early as the case of *Ord v. Ruspini*, 2 Esp. 569, Lord Kenyon said that, as the transactions between plaintiff and defendant in that suit were all of the same date, and the mutual claims arose in the course of those transactions, it would be the highest injustice to allow one to have an operation and not the other, by reason of the statute; and therefore held defendant's claim not barred.

This case is clearly distinguishable from an independent action for the breach of warranty, or an affirmative claim for damages by reason thereof in excess of plaintiff's claim.

Judgment affirmed.

(Opinion published 57 N. W. Rep. 211.)

**JACOB BIRNBERG vs. SAMUEL SCHWAB et al.**

Submitted on briefs Dec. 12, 1893. Affirmed Dec. 18, 1893.

No. 8470.

**Verdict Justified by the evidence.**Evidence *held* to justify the verdict.

Appeal by defendants, Samuel Schwab and Max Schwab, from an order of the District Court of Ramsey County, *Chas. D. Kerr, J.*, made July 6, 1893, denying their motion for a new trial.

The defendants were partners in business at St. Paul, dealing in dry goods and notions at wholesale. They occupied a three story brick store, No. 211 East Fourth Street, in which was a freight elevator running through all the floors from cellar to third story. The openings in the floors were closed by trap doors, which opened and shut automatically as the elevator approached and passed through. The plaintiff, Jacob Birnberg, was a customer and was in the store examining goods between three and four o'clock in the afternoon of December 22, 1891. While on the main floor he started to go to the counting room and fell through the opening into the basement and was injured. It appears that the platform elevator was above, and for some reason the trap door in this floor was left open and that plaintiff casually walked into it. He brought this action to recover his damages, claiming he was injured in consequence of the negligence of the defendants, in leaving this opening unguarded by rail or otherwise. The defendants denied negligence and charged that plaintiff was himself negligent in walking into the opening; as it was at the side and he and old customer, familiar with the premises. The issues were tried February 15, 1893. At the close of the evidence defendants asked the Judge to instruct the jury to return a verdict for defendants. This was refused and they excepted. Among other things the Judge charged the jury as follows:

"It is the duty of him who keeps an establishment where the public are invited to trade and do business, to use ordinary care and diligence to make and maintain the appliances reasonably safe for those visiting it for such purposes. Extraordinary diligence or care is not required."

"His duty in that behalf is confined to those parts and places in the establishment where the public are invited to go, or where the particular customer who complains of injury has been invited or licensed to go."

"Plaintiff does not claim this trap door in the floor was open on account of any lack of repair or condition of the elevator; but the fact of its being open is what he complains of—that it was open and unprotected."

"It was not incumbent upon the plaintiff any more than upon the defendants, to use extraordinary care or unusual diligence. The duty resting upon him was simply to use ordinary care and prudence, as it is upon every man in the pursuit of his daily avocation to use his eyesight—to make use of the senses which nature has given him; and if, by failure to use his senses when, as an ordinarily prudent man he ought to have used them, he is injured, he cannot lay the responsibility of his injury upon other persons."

The jury returned a verdict for plaintiff and assessed his damages at \$1,300. Defendants made a case containing all the evidence and it was settled, signed and filed. On it they moved for a new trial, on the ground that the verdict was not justified by the evidence. The Court refused and they appealed. The discussion here was upon the evidence, whether or not it sustained the verdict.

*Kueffner, Fauntleroy & Searles*, for appellants.

*Otto K. Sauer*, for respondent.

GILFILLAN, C. J. There is no question presented in the case, except, did the evidence make a proper case for the jury upon the questions of defendants' negligence and plaintiff's contributory negligence?

We are satisfied that upon both these questions the case was a proper one for the jury, and that their verdict must stand. The evidence presents only simple questions of fact, involving no rule or principle in the law on the subject of negligence, and therefore a rehearsal of it would be profitless.

Order affirmed.

(Opinion published 56 N. W. Rep. 841.)

## HENRY NELSON vs. VILLAGE OF WEST DULUTH.

Submitted on briefs Nov. 28, 1893. Reversed Dec. 18, 1893.

No. 8879.

**Measure of damages.**

In an action for trespass in casting and imposing earth on plaintiff's lot, the measure of damages is, in general, the difference between the value of the lot in its former state and the value after the earth is so imposed upon it. If there be a building on the lot, not alleged to have been injured, evidence of its separate value is inadmissible.

**An assessment for a street improvement is not evidence of value.**

Where there is a street constructed along the lot, affecting its value, evidence of the amount of assessment the owner paid on account of the improvement is inadmissible on the question of the value of the lot.

**Nor is the cost of removing earth or building a retaining wall.**

In such an action, evidence of what it would cost to remove the earth, and to build a retaining wall to keep it off, is not admissible to increase the damages beyond the diminution in value of the lot.

**Excessive or inadequate damages as ground for a new trial.**

In an action in tort, the objection that the damages recovered are excessive or inadequate and insufficient, as a ground of motion for a new trial, comes under subdivision 4, and not subdivision 5, 1878 G. S. ch. 60, § 253, as amended, Laws 1891, ch. 80.

**Passion or prejudice of the jury the ground.**

In such case it is not enough that the damages are, in the opinion of the court, too large or too small. They must appear to have been given under the influence of passion or prejudice.

**Opinion of the trial court on the question of passion or prejudice of the jury.**

When the case comes under subdivision 4, the doctrine of *Hicks v. Stone*, 13 Minn. 434, (Gil. 398,) does not apply.

Appeal by the defendant, the Village of West Duluth, from an order of the District Court of St. Louis County, *Frederick Hooker, J.*, made April 8, 1893, granting plaintiff's motion for a new trial.

The plaintiff, Henry Nelson, brought this action to recover \$800 damages to lot one (1) in block twenty six (26) in Grassy Point Addition to West Duluth, by filling in earth upon it in grading a street. The issues were tried November 26, 1892, and plaintiff had a verdict for only \$25. He moved for a new trial, on the ground that

55	497
56	91
55	497
164	221
55	497
56	218
55	497
81	386
55	497
488	411
88	415

the damages were inadequate and insufficient, and given under the influence of prejudice and passion; also for errors of law occurring at the trial and excepted to by him. The Court granted the motion and ordered a new trial. The defendant appeals.

*H. H. Phelps*, for appellant.

The difference in value of the lot before and after the fill was made, was the proper measure of damages, and the Judge so instructed the jury. *Karst v. St. Paul, S. & T. F. R. Co.*, 22 Minn. 118; s. c. 23 Minn. 401; *Baldwin v. Chicago, M. & St. P. Ry. Co.*, 35 Minn. 354; *Barnett v. St. Anthony Falls W. P. Co.*, 33 Minn. 265; *Carner v. Chicago, St. P., M. & O. Ry. Co.*, 43 Minn. 375; *Hayes v. Chicago, M. & St. P. Ry. Co.*, 45 Minn. 17; *Hosking v. Phillips*, 3 Exch. 168.

The amount of the assessment which the village had levied against the lot for street improvement was not proper evidence of damages in this case, nor was the cost of removing the earth, or of building a retaining wall, and evidence thereof was properly excluded. Plaintiff did not mention these matters in his complaint or ask damages on account of them. The lot was low and some of the witnesses thought the filling in over the line of the street did not diminish its value. There is nothing in the case to indicate prejudice or passion on the part of the jury.

For these reasons the Court below was wrong in granting a new trial. We ask that the order be reversed.

*J. B. Richards*, for respondent.

The order granting a new trial should be affirmed under the rule adopted by this Court in *Hicks v. Stone*, 13 Minn. 434, and followed and applied in numerous cases since. *Fox v. Burke*, 29 Minn. 171; *Young v. Davis*, 30 Minn. 293; *Clapp v. Minneapolis & St. L. Ry. Co.*, 33 Minn. 22; *Werner v. Schroeder*, 38 Minn. 321.

The new trial was asked and granted because the Judge excluded evidence of the value of the building on the lot, and of the amount of the assessment for street improvement, and of the cost of removing the earth and building a retaining wall. *Nichols v. City of Duluth*, 40 Minn. 389; *Kopp v. Northern Pac. R. Co.*, 41 Minn. 310; *McCarthy v. City of St. Paul*, 22 Minn. 527.

GILFILLAN, C. J. The action is for a trespass upon real estate. The defendant, a municipal corporation, in grading a public street in front of plaintiff's lot, which seems to have been in low ground, built an embankment, the slope of which, wholly or in part, extended over and rested upon the lot. On the trial the jury rendered a verdict in favor of the plaintiff for \$25. He moved for a new trial, on the grounds stated: "(1) For error of law occurring at the trial, and excepted to by plaintiff; (2) inadequate and insufficient damages appearing to have been given under the influence of prejudice." The court granted the motion,—on which ground does not appear; so that, if the order is justifiable on either, it must be sustained.

The first error in law claimed by respondent was in excluding evidence of the value of a building on the lot. The complaint does not allege any injury done to the building; only that in times of high water the water will run through and under it. The legal measure of damages in such a case is the difference between the market value of the lot in its original state, with the building on it, but with the street grade there, and its market value after the slope had been imposed on it; and the court admitted all evidence offered of that. There was no error in excluding evidence of the separate value of the building. The court also excluded evidence offered by plaintiff of the amount of assessment he paid for the street improvement. That would not have been any evidence of the value of the lot, any more than would have been evidence of how much he paid to clear off an incumbrance. The graded street was there, and it probably benefited the lot,—enhanced its value,—but the benefit and enhancement were just the same whether he paid much or little, or did not pay anything, to have the improvement put there. We do not overlook the fact that a witness testified that an assessment enhances the value of the property all it costs. That is as absurd as to say that a building, though it may be worth but \$500, enhances the value of the lot of which it has become a part \$2,000, because it cost the owner that to put it there.

The court also excluded evidence offered by plaintiff of what it would cost to remove the slope, and build a retaining wall to prevent the earth in the embankment falling down upon the lot. As we have stated, the measure of damages in such a case is the



diminution in value caused by the slope extending over upon the lot. In general, that is the limit of the recovery; but, because it is sometimes one's duty to use reasonable effort to avert or lessen the consequence of an injury from the wrong of another, it is sometimes admissible for the defendant to show that the property can be restored to its original state of usefulness at a cost less than the amount of diminution in value if nothing be done. This was assumed in *Karst v. St. Paul, S. & T. F. Ry. Co.*, 23 Minn. 401; *Barnett v. St. Anthony Falls Water-Power Co.*, 33 Minn. 265, (22 N. W. 535;) and *Kopp v. Northern Pacific R. Co.*, 41 Minn. 310, (43 N. W. 73.) Such evidence is admissible, however, only to reduce, not to increase, the damages recoverable, under the general rule. The evidence offered could not have benefited plaintiff, so he could not complain. There was no error of law for which a new trial could be granted.

The other ground—inadequacy of damages—remains to be considered. In an action in tort, the objection that the damages are excessive or inadequate, as a ground of motion for a new trial, comes under subdivision 4, and not subdivision 5, of 1878 G. S. ch. 66, § 253, as amended, Laws 1891, ch. 80, which was not called to our attention in *Henderson v. St. Paul & Duluth R. Co.*, 52 Minn. 479, (55 N. W. 53.) That subdivision reads: "Excessive or inadequate or insufficient damages, appearing to have been given under the influence of passion or prejudice." Under that subdivision, it is not enough that the damages may, in the opinion of the court, be too large or too small; it must appear that they were given under the influence of passion or prejudice. Ordinarily, this would appear from the verdict being so large or so small, when compared with what the evidence indicates it ought to be, that the court must conclude that the jury did not arrive at the amount upon a fair and impartial consideration of the evidence. There is nothing in this case to justify a suggestion of that.

When the case comes under subdivision 4, the doctrine in *Hicks v. Stone*, 13 Minn. 434, (Gil. 398,) does not apply.

Order reversed.

(Opinion published 57 N. W. Rep. 149.)

BRIDGET McDONOUGH vs. OVID P. LANPHER *et al.*

Submitted on briefs Nov. 23, 1893. Reversed Dec. 18, 1893.

55	501
88	160
54	121485

No. 8401.

Servant while in the masters Elevator going to or from work is a servant still and not a passenger.

Defendants carried on their business in a five-story building, using the whole of it. In the building was an elevator, running from the lowest to the highest story, used for freight, but in which the employes in the business were permitted, but not required, to ride in going up to and down from the stories in which they respectively worked. *Held*, that while so riding they were employes, and not passengers, and the degree of care required of defendants was that required on the part of the master towards his servant, and not that imposed on a common carrier of passengers in respect to those carried by him.

Appeal by defendants, Ovid P. Lanpher, Dudley B. Finch, James H. Skinner and Charles W. Williams, from an order of the District Court of Ramsey County, *John W. Willis, J.*, made June 19, 1893, denying their motion for a new trial.

The plaintiff, Bridget McDonough, was sixteen years old and in the employ of defendants. In going to her work about eight o'clock in the morning of May 7, 1892, she took the elevator to go up to the fifth story and was injured in the manner stated in the opinion. A guardian *ad litem* was appointed, and she brought this action and obtained a verdict for \$1,250. Defendants moved for a new trial, and being denied appeal.

*Kueffner, Fauntleroy & Searles*, for appellants.

The Judge instructed the jury that defendants were bound to exercise the highest skill, foresight and prudence in making the elevator safe for the purpose of transporting human beings from one portion of the building to another. This was erroneous as applied to the plaintiff. She was an employe of defendants engaged on the fifth floor with about seventy-five other girls who were in the habit of using the elevator every morning to go up to their work. The relations between plaintiff and defendants were those of master and servant, and not those of common carrier and passenger. The rule

of ordinary care measured their respective rights and obligations. *Ryan v. Cumberland Valley R. Co.*, 23 Pa. St. 384; *Gillshannon v. Stony Brook R. Corp.*, 10 Cush. 228; *Russell v. Hudson River R. Co.*, 17 N. Y. 134; *Tunney v. Midland Ry. Co.*, L. R. 1 C. P. 291; *Seaver v. Boston & M. Railroad*, 14 Gray, 466; *O'Brien v. Western Steel Co.*, 100 Mo. 182.

Plaintiff's contributory negligence barred her recovery, and the Court should have directed a verdict for defendants. *Ludwig v. Pillsbury*, 35 Minn. 256; *Palmer v. Harrison*, 57 Mich. 182.

*Chas. H. Taylor*, for respondent.

The mere fact that plaintiff rested her foot upon the strip or brace at the floor of the elevator, even though the heel, unknown to plaintiff, extended beyond the edge of the elevator floor, is not negligence *per se*, especially when she had reason to believe that no danger existed beyond. She was a passenger and not guilty of contributory negligence. *Dahlberg v. Minneapolis Street Ry. Co.*, 32 Minn. 404; *Gray v. Rochester City & B. R. Co.*, 61 Hun, 212; *Strawbridge v. Bradford*, 128 Pa. St. 200; *Laing v. Colder*, 8 Pa. St. 479; *Francis v. New York S. Co.*, 114 N. Y. 380; *Hullbert v. New York C. R. Co.*, 40 N. Y. 145; *Lent v. New York C. & H. R. R. Co.*, 120 N. Y. 467.

The proprietor of an elevator used for carrying passengers, is a passenger carrier, and subject to the same responsibilities as to care and diligence to secure safety, as are carriers of passengers by stage coach and railway. *Goodsell v. Taylor*, 41 Minn. 207; *Treadwell v. Whittier*, 80 Cal. 574; *Strawbridge v. Bradford*, 128 Pa. St. 200.

An employe rightfully upon a conveyance of his employer used for carrying passengers, is entitled to all the rights and care of a passenger, unless his being upon it was a necessary part of his employment, or contemplated from the very nature of his contract of service. *State v. Western Maryland R. Co.*, 63 Md. 433; *Ryan v. Chicago & N. W. Ry. Co.*, 60 Ill. 171; *Ohio & Mississippi Ry. Co. v. Muhling*, 30 Ill. 9; *Washburn v. Nashville & C. Ry. Co.*, 3 Head, 638; *Prince v. International & Gr. N. R. Co.*, 64 Tex. 144; *Woollery*

*v. Louisville, N. A. & C. Ry. Co.*, 107 Ind. 381; *Gillenwater v. Madison, &c., Ry. Co.*, 5 Ind. 340; *Fitzpatrick v. New Albany, &c., Ry. Co.*, 7 Ind. 436.

GILFILLAN, C. J. The action is to recover for a personal injury. The defendants were engaged in business as wholesale dealers in hats, caps, furs, gloves, etc., and manufacturing and repairing furs and fur garments, carrying on the business in a five-story building on Fourth street, St. Paul. In the building was an elevator, running from the lowest to the highest story. The elevator was not inclosed with anything in the nature of wainscoting or boarding, but consisted of a platform or floor, with posts at the corners, and an intermediate post on each side extending up to the framework at the top. About three feet above the floor was a narrow strip of board on the sides, nailed to the posts, and another about three inches high from the edge of the platform. The plaintiff was working for defendants, and was employed with seventy-five or a hundred others in the fur department of the business, the work of which was done in the fifth story. The elevator was used for carrying freight, and the employes were permitted, especially when arriving in the morning and when quitting at night, but were not required, to ride up and down in it, to and from the stories where they worked. There were stairs which they could use if they chose. On arriving at the building one morning, plaintiff took the elevator to ride up to the fifth story, and on entering it she rested her hand on the upper strip and one foot on the lower, and in ascending, the foot, which must have been in part outside the strip, was caught and injured by a joist or timber in one of the floors projecting inside the wall or casing of the elevator well or shaft so as to come very near the edge of the elevator floor.

On the trial plaintiff had a verdict, and the appeal is from an order denying a new trial.

The appellants make several assignments of error, only one of which it is necessary to consider.

The court instructed the jury: "If you find that this elevator described in the testimony was used, with their knowledge and consent, as a passenger elevator, in that case the defendants were bound to the exercise of the highest human skill, foresight, and

prudence in making the elevator safe for the purpose of transporting human beings from one portion of the building to another. So much for the obligation resting on the defendants in case you find this to have been a passenger elevator."

That is the degree of care required of a common carrier of passengers towards the passengers he carries. It is a higher degree than is required of a master towards his servant. That degree is stated in *Cooley on Torts* (page 567) thus: "The law does not require him to guaranty the prudence, skill or fidelity of those from whom he obtains his tools or machinery, or the strength or fitness of the materials they make use of. If he employs such reasonable care and prudence in selecting or ordering what he requires in his business as every prudent man is expected to employ in providing himself with the conveniences of his occupation, that is all that can be required of him." See *Gates v. Southern Minn. Ry. Co.*, 28 Minn. 110, (9 N. W. 579.)

The rules are general, and from considerations of convenience and public policy there are no exceptions. There are sound reasons for requiring a higher degree of care in one case than in the other. An obvious one is, that in the case of the passenger, he neither does know nor can know, nor is he called on to inform himself, whether the carrier employs competent and careful servants and fit and proper machinery and means for performing the service, but he commits himself unreservedly to the care of the carrier; while the servant in most cases may know, and, if the matter is open to ordinary observation, is bound to know, whether the machinery and appliances employed by the master be fit and proper.

As there cannot be two rules as to cases between master and servant, one applying to the use of one kind of machinery and another to another kind, it is evident that if the relation between plaintiff and defendants at the time of the injury was only that of master and servant, the instruction was wrong. We suspect the court below was misled by some indefiniteness in the opinion in *Goodsell v. Taylor*, 41 Minn. 207, (42 N. W. 873,) which was not a case of master and servant, but of innkeeper and guest; and it was said: "The relation between the owner and manager of an elevator for passengers is similar to that between an ordinary common carrier of passengers and those carried by him." That would not be

applicable where a relation requiring a different degree of care exists, and the person is riding and being carried in that relation.

The question comes, then, to this: Was plaintiff, in riding in the elevator from the lower to the fifth story of the building, doing so as the defendants' servant, or was she riding as a passenger, being carried by them as a common carrier?

We find no case precisely similar in which that question was distinctly passed on. *Treadwell v. Whittier*, 80 Cal. 574, (22 Pac. 266,) was not a case of an employe, but of a customer, riding in an elevator. It was therefore not unlike *Goodsell v. Taylor*, and the rule expressed in the latter case was applied. *Wise v. Ackerman*, 76 Md. 375, (25 Atl. 424,) was the case of an employe, and the court, treating the plaintiff as in the elevator as an employe, and not as a passenger, stated the rule: "But an elevator is in many respects a dangerous machine, and, though it may be primarily intended only as a freight elevator, yet, if the employes, in the course of their employment, are authorized or directed to use the elevator as a means of personal transportation, the employer controlling the operation of the elevator is required to exercise great care and caution, both in the construction and operation of the machine, so as to render it as free from danger as careful foresight and precaution may reasonably dictate." This is considerably short of the degree of care required of a common carrier of passengers, and stated in the instruction of the court below,—“the exercise of the highest human skill, foresight, and prudence.” It is but the expression, in different terms, of the degree required of a master towards his servant; for an ordinarily prudent man employing a dangerous machine where human life is risked will exercise great care and caution in respect to its construction and operation.

The only cases nearly analogous in which the question whether the person injured was a passenger or employe was passed on were cases where a railroad company was accustomed to carry their employes, without charge, to and fro between the place where they lived or boarded and the place where they worked for the company, and one of them was injured while riding to and from the place of work.

Of these cases *Gillenwater v. Madison, &c., R. Co.*, 5 Ind. 339, holds that the person so carried was a passenger. *Fitzpatrick v. New Al-*

bany, &c., *R. Co.*, 7 Ind. 436, cited by respondent to the same point, does not so hold; the court saying: "He was not, it is true, a mere passenger. His travel on the cars was an incident to the business in which he was employed; but under an agreement with the defendants he was to be regularly conveyed to and from his work. This, it seems to us, is an implied engagement that they would convey him as safely and securely as if he really had been a passenger in the ordinary sense of the term." So far as that may mean that, though the person injured was not a passenger, but an employe at the time, there was such implied agreement, or any obligation of care other than that imposed by law upon a master towards his servant, the case stands alone; and we think the grounds on which the court made that remark were overruled in *Columbus, etc., R. Co. v. Arnold*, 31 Ind. 174. *State v. Western Maryland R. Co.*, 63 Md. 433, is an instructive case. The person killed was employed by the company as brakeman on a passenger train running in the morning from U. B. to B. C., and returning in the evening, every day, except Sundays. On arriving at U. B. Saturday nights, the time was his own until Monday morning, when he was expected to be at U. B. to resume his duties. Sunday he took a train at U. B. to go to B. C., where his family resided, traveling on a pass which the conductor of his train held for himself and crew, and on that trip the decedent was killed in a collision. It did not appear that by the terms of his employment he was to be carried Saturday evening or Sunday from U. B. to B. C., and back again for Monday morning. The court reviewed most of the decisions to that time, and held the decedent was a passenger when killed, and said: "In whatever else they may differ, these cases all agree upon one principle, and that is that if the plaintiff is not, at the time of the accident, engaged in the actual service of the company, or in some way connected with such service, the company is liable for the negligence of its employes." *O'Donnell v. Allegheny V. Ry. Co.*, 59 Pa. St. 239, held that a carpenter who was to be carried to and from his place of work was, while being so carried, a passenger.

On the other hand, holding that in cases of the kind the person is carried as an employe, and not as a passenger, are *Tunney v. Midland Ry. Co.*, L. R. 1 C. P. 291; *Gillshannon v. Stony Brook R. Co.*, 10 Cush. 228; *Seaver v. Boston & Maine R. Co.*, 14 Gray, 466; *Russell*

v. *Hudson River R. Co.*, 17 N. Y. 134; *Ryan v. Cumberland V. R. Co.*, 23 Pa. St. 384; and *Kansas Pacific R. Co. v. Salmon*, 11 Kan. 83. *Rosenbaum v. St. Paul & Duluth R. Co.*, 38 Minn. 173, (36 N. W. 447,) is really to the same effect. The company transported the employes daily from the boarding car to their place of work and back again. The plaintiff, having returned to the boarding car, found he had left his coat at the place of work, got upon a gravel train to go back and get it, and while on it was injured. If he got on the car as a passenger, he was a trespasser, for the conductor had no authority to take passengers; but if he got on as an employe he was not, and the court held he was on the train as an employe.

There is, therefore, a considerable weight of authority in support of the proposition that in such cases the person is carried as an employe, and not as a passenger.

And in a case like this reason would seem to point to the same result. State the matter to one not used to making hair-drawn distinctions but to judging by the dictates of business common sense, and we do not think he would hesitate in arriving at that result.

In our opinion, from the time plaintiff entered the building for the purpose of going to work she was there as an employe, whether she walked up the stairs or rode up in the elevator.

Order reversed.

(Opinion published 57 N. W. Rep. 152.)

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HARRIET MACAULEY vs. DENNIS RYAN.

Argued Dec. 4, 1898. Appeal dismissed Dec. 18, 1898.

No. 8406.

From what, appeal may be taken.

A decision or ruling of the court that a party be allowed to amend his pleading, no order being made or entered, cannot be appealed from as from an order.

Appeal by defendant, Dennis Ryan, from a determination of the District Court of Ramsey County, *John W. Willis, J.*, made April 29, 1893, allowing plaintiff to amend her complaint.



The plaintiff, Harriet Macauley, by her complaint, alleged that on December 31, 1887, she sold and transferred to defendant one hundred shares of the capital stock of the People's Bank and that he agreed to pay her therefor \$5,375, that he had paid only \$500 and she demanded judgment for the balance with interest. Defendant denied that he purchased the stock. He alleged that it was pledged to the Bank as collateral security for her indebtedness of \$4,671.17 to it, and that she authorized him to sell the stock and pay her debt and account for the surplus. That he sold it for \$5,300 and paid her debt and also paid her \$500 and he offered her judgment for the residue, \$182.83. This was denied by the reply.

A jury was waived and the issues were tried April 24, 1893. After hearing the evidence the Court announced that he should decide that the relation of the parties was that of principal and agent, that defendant did not buy her stock but acted under a power of attorney from her and sold it as her agent, that he would have dismissed the action if plaintiff had not offered judgment for the \$182.83, but under the answer he would order judgment for her for that sum. Thereupon plaintiff moved the Court for permission to amend the complaint so as to plead the transaction. Defendant opposed this, but the Court granted the motion on condition that she serve her amended complaint in thirty days and pay all the costs and disbursements defendant had incurred in the action. He was allowed three months thereafter in which to answer. Notes of all this were taken at the time by the shorthand reporter and it was included in the case as settled, but no formal order was entered or findings made. Defendant appealed from this determination. A return was made and filed in this Court and the appeal set down for argument. When it came on for hearing the plaintiff moved to dismiss the appeal.

*C. D. & Thos. D. O'Brien*, for appellant.

*Warner, Richardson & Lawrence*, for respondent.

GILFILLAN, C. J. This case was tried by the court, without a jury. On the trial, after the parties had submitted their evidence and summed up the case, the court intimated how it would decide it, whereupon the plaintiff asked leave to amend her complaint so, as defendant contends, as to allow the setting up of an entirely dif-

ferent cause of action from that in the original complaint. The court announced that it granted the motion on certain conditions, among them that plaintiff should be allowed thirty days within which to amend the complaint, and the defendant was allowed three months within which to answer. That seems to have been regarded by all—the court and the parties—as the end of the trial proceedings, and it seems to have been considered that all that had been done in the trial went for naught. No order allowing the amendment was entered in the minutes, or signed and filed.

The defendant assumes to appeal from what he calls the “order allowing the amendment.”

When an amendment is allowed and made in the trial, the allowance and amendment are a part of the trial, and, being made to appear by a settled case or bill of exceptions, may be reviewed on an appeal from the judgment or from an order refusing or granting a new trial, and they can be reviewed in no other way, any more than can any other ruling or decision made in the course of the trial. In no other case can we review a ruling or decision of a court not entered in an order. There can be no appeal until then. Indeed, in this case, without such order, the plaintiff has no leave to amend. Until it is made, there is no legal reason why the court should not go on and decide the case according to the evidence submitted.

As there was nothing to appeal from, the appeal is dismissed.

(Opinion published 57 N. W. Rep. 151.)

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*In re* LUDWIG KAHN, Insolvent.

Argued Dec. 7, 1898. Affirmed Dec. 18, 1898.

No. 8473.

**The place of a sale of goods.**

Where an insolvent debtor, residing and doing business and having his property in this state, makes in this state an agreement with a creditor, residing in another state, to make a preference to him in payment, by sending to him, at his place of residence, goods to be applied in payment, and the debtor sends him the goods, consigned to him at his place of

residence, it is a Minnesota transaction, the legality of which is to be determined by the laws of this state.

**Allowing claim on condition that a preference be restored.**

The court in which an insolvency proceeding is pending may refuse to allow the claim of a creditor who has received a preference, such as is prohibited by the insolvent law, except on condition that he restore to the assignee what he so received.

**Same if made to the creditor on some other claim.**

And this is so whether the unlawful preference was upon the claim he presents for allowance or upon some other.

**Same if the claim be transferred.**

Such creditor cannot, by transferring his claim, put his transferee in any better position in this respect than himself.

Appeal by claimant, Eau Claire National Bank, from a judgment of the District Court of St. Louis County, *J. D. Ensign, J.*, entered July 25, 1893, disallowing its claim against the estate of Ludwig Kahn, Insolvent.

On December, 28, 1892, Ludwig Kahn of Duluth made an assignment of all his nonexempt property to Morris L. Fischbein for the benefit of his creditors, under Laws 1881, ch. 148, as amended. On February 17, 1893, the Eau Claire National Bank of Eau Claire, Wisconsin, presented to the assignee its claim for \$3,053.77. He disallowed it and the Bank appealed to the District Court where after trial the claim was again disallowed. From that judgment the Bank brings this appeal.

*R. R. Briggs*, for appellant.

*Twohey & Morris*, for respondent.

GILFILLAN, C. J. In and prior to December, 1892, Ludwig Kahn was a merchant, residing and doing business at Duluth, in this state. Alfred Kahn, his brother, was a merchant residing and doing business at Eau Claire, Wis. Ludwig was indebted to Alfred in the sum of \$6,750, on three promissory notes,—one for \$3,000; one for \$2,500; and one for \$1,250,—all past due on the 5th of December; and on that date, at Duluth, Alfred demanded payment from Ludwig, and was informed by him that he could not pay them, or any of them, and thereupon, as found by the court below, (and the evidence sustains the finding,) it was agreed between them that Lud-

wig should ship some goods from his store at Duluth to Alfred, at Eau Claire, to be applied on the indebtedness, the goods not being then selected, but their general character agreed on. Between the 7th and 28th days of December, Ludwig, pursuant to that agreement, shipped at Duluth, by railroad, consigned to Alfred, at Eau Claire, and which were delivered by the railroad company to the latter at that place goods to the amount of \$3,948.02, and the latter applied the amount to satisfy the \$2,500 and \$1,250 notes, and indorsed \$106.68 on the \$3,000 note. December 28, 1892, Ludwig made and filed in the county of St. Louis an assignment for the benefit of his creditors to Fischbein, who accepted the trust. January 14, 1893, Alfred transferred the \$3,000 note to the appellant, the Eau Claire National Bank, which, on February 17th, filed the same as a claim in the insolvency proceeding, and, on the disallowance by the assignee, it appealed to the court, and it also disallowed the claim, and from that this appeal is taken. On the evidence there can be no question but that, at the times mentioned, Ludwig was insolvent, and that Alfred had reasonable cause to believe—indeed, that he knew—him to be insolvent, and that the transfer of the goods was made with intent to give a preference to Alfred over the other creditors. The ground upon which the court disallowed the claim was, as stated in its conclusions of law, that Alfred was not entitled to prove the claim against the insolvent estate, and participate in the distribution thereof, without first restoring to said estate said goods, or the value thereof, and that the bank occupies no better position than Alfred would have occupied had he filed the claim. This conclusion of law presents the only question of importance in the case. The appellant makes a good many points in its brief, but, except so far as they will be referred to in this opinion, they are without foundation.

The appellant contends that, inasmuch as the title to the property did not vest in Alfred until delivery by the carrier to him at Eau Claire, the transfer was a Wisconsin transaction, and, as our statute can have no extraterritorial force, it must be judged by the laws of that state. If this were an action against Alfred to recover the property or its value, the question would be presented whether it was legal and valid in the place where the transaction was had. But in that case, as the agreement for the preference was made in

this state, and as everything done or to be done by the debtor, to wit, the separating and shipping the goods, was done in this state, leaving nothing to be done by the creditor but to receive them on their arrival at Eau Claire, it was a Minnesota transaction, so far as the question of its legality was concerned. The agreement was unlawful, the separating and shipping the goods were unlawful, and those acts did not become lawful merely because the title to the property vested in Wisconsin. See *In re Howes*, 38 Minn. 403, (38 N. W. 104;) *In re Dalpay*, 41 Minn. 532, (43 N. W. 564;) *Macdonald v. First Nat. Bank*, 47 Minn. 67, (49 N. W. 395.) The question, however, is not whether a recovery could be had in an action against Alfred, but it is, could he come into the insolvency proceedings, unconditionally, to share with the other creditors in what remains of the insolvent's assets, after he has taken a part of such assets contrary to the intent of the law under which the proceedings are had.

The appellant also contends that the payment, by transfer of the goods, on the indebtedness evidenced by the several notes, was general, and the creditor could apply it upon any of the notes he chose, and, having applied it to extinguish the \$2,500 and \$1,250 notes, and only \$106.68 on the \$3,000 note, the last note is tainted with the illegality only to the extent of the \$106.68. As between debtor and creditor, when a payment is made upon account of several debts from the former to the latter, if the former do not apply the payment to any particular debts, the latter may ordinarily do so. But he cannot, by doing so, affect the rights of third persons. If we are to adopt the theory that a preferential payment taints the debt on which it is made, then, as this payment was made generally on the whole debt of \$6,750, it tainted that whole debt, and no subsequent agreement or act of the parties, or either of them, could affect the rights of other creditors, growing out of it. We do not, however, wish to decide that the debt itself is tainted. If a creditor who has accepted a preference may be excluded from proving a claim, on the ground of such preference, it is not because the claim is tainted or affected, but because the creditor has diminished the assets of the insolvent in a way contrary to the intent and spirit of the insolvent law. That being so, he may be excluded, whether the preferential payment was made on the claim presented for al-

lowance or on some other. It is immaterial, therefore, that Alfred applied the payment upon the \$2,500 and \$1,250 notes, and only \$106.68 on the \$3,000 note.

If Alfred could not prove the debt, and claim a distributive share of the insolvent funds, he could not, by transferring the note after maturity, place the transferee in any better position than himself.

And this brings us to the main question in the case: Could the assignee and the court having charge of the insolvency proceeding refuse to allow Alfred to prove the claim, and share in the distribution, except on condition that he restore to the assets the property he withdrew from them, or its value, so that in the distribution there should be equality among the creditors? The appellant contends that, in case of a preferential payment, the act gives the assignee no other remedy than an action against the preferred creditor to recover the property or its value, or to set off or counterclaim the value against the debt presented for allowance. To set off or counterclaim only the amount of money paid, or only the value of the property transferred in payment, would, in effect, ratify the preferential payment, and give the creditor the full benefit thereof. To remit the assignee to an action would give a creditor out of this state, and who has taken the property out of this state, an advantage over preferred creditors living in this state, and within the jurisdiction of its courts. The act (Laws 1881, ch. 148) does not in express terms, as most bankrupt laws have done, authorize the disallowance of a claim, except on condition that the creditor restore to the assets what he has received as a preferred payment. The only express authority given in respect to such payments is in section 4: "And the assignee may, by action or other proper proceedings, have all such conveyances, payments and preferences annulled and adjudged void, and recover the property so conveyed, or the value thereof, and recover the payment so made, and convert all proceeds into money, as provided in this act." An action may be inadequate, or the assignee may be practically unable to bring it, as where the property and the creditor cannot be reached by the process of our courts. What, then, would be other proper proceedings to bring the property or its value into the hands of the assignee? If the creditor and the property cannot be reached by process to commence an action, or an action for any reason might

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be inadequate, and if the creditor has come into the insolvency proceeding, and submitted himself or his claim to the jurisdiction of the court for the purpose of the proceeding, can he, in that proceeding, and as a party to it, to the extent of his claim presented, be called upon to surrender in it the assets that he has withdrawn, contrary to the intent of the law under which the proceeding is had? If he cannot, then the law is certainly very lame. The "other proper proceedings" mentioned in the act are legal proceedings other than by action. There are no legal proceedings other than an action that the assignee can take outside of the insolvency proceeding; and, if he cannot in that proceeding do anything to bring about the result intended,—the restoration of the withdrawn assets,—then the clause authorizing him to annul the preference by other proper proceedings had no meaning. We are driven, therefore, to hold that the clause means nothing, or that it authorizes proceedings in the insolvency proceeding, and, according to a well-known rule of construction, we are bound to adopt the latter view.

The court, in the insolvency proceeding, cannot operate on the person of the creditor; that is, it cannot render an affirmative personal judgment against him. It can operate only on the claim he presents for allowance, and whatever direction it may make with reference to the creditor restoring withdrawn assets must expend itself upon the claim. There is no way such a direction may be made to operate on the claim, except by way of condition precedent to its allowance,—just the condition the court below imposed.

Judgment affirmed.

(Opinion published 57 N. W. Rep. 154.)

SWEN L. THOMPSON *vs.* ANDREW P. JOHNSON *et al.*

Argued Dec. 5, 1893. Affirmed Dec. 13, 1893.

No. 8439.

55	515
66	413
55	515
68	228
55	515
72	457

**Findings sustained by the evidence.**Findings of fact *had* sustained by the evidence.**Unlawful preference given by an insolvent debtor to his creditor.**

When a creditor of an insolvent debtor secures an unlawful preference by the transfer of property, the transfer will, at the suit of the assignee in insolvency, be wholly void. It will not be partly valid because the creditor, to secure the preference, paid in money part of the agreed price of the property.

**Others who participate in the preferential transaction.**

And where the preference is given by transferring property to the creditor and others, who pay part of the agreed price in money, the transfer will not be valid as to them, if they knew the purpose was to give a preference to the creditor.

**Such preferential transfer, void ab initio.**

A judgment declaring such a transfer void relates back to its date, so that the transferee may be charged with the value of the use of the property, and for the damages to it while in his possession; and if, when, pursuant to the judgment, the property is delivered to the assignee, it appears to have been damaged, the court may then ascertain the amount thereof, and modify the judgment accordingly.

Appeal by defendants, Andrew P. Johnson, Aaron Abrahamson, James P. Onstad, Andrew Nash, Jonas Olander, and Lewis Lilly, from an order of the District Court of Fillmore County, *John Whytock, J.*, made June 7, 1893, denying their motion for a new trial.

Edward A. Hostvet and Carl C. Hourn were partners in business. They had a creamery at Houston, another at Rushford and a creamery and feed-mill at Lanesboro. They also had two ice-houses and a dray business at Rushford. The creameries, feed-mill and ice-houses stood on leased ground and were personal property. Hostvet died intestate January 9, 1888. Hourn continued the business as surviving partner. The firm was owing considerable and was in fact insolvent, but Hourn believed the partnership property worth



more than the indebtedness. On December 6, 1889, he sold the dray property to Peder E. Pederson for \$500 in payment of the firm debt to him of that amount. On December 7, 1889, he sold the creamery and feed-mill at Lanesboro to Nelson Bros. for \$1,000 in payment of the firm debt to them of that amount. On the same day he sold the creamery at Houston to the defendants above named for \$2,100 in payment of the firm debts to defendants, Andrew P. Johnson, Andrew Nash and Aaron Abrahamson of that amount. Johnson and the other defendants above named formed a partnership to purchase and carry on that business and they each paid to Johnson, Nash and Abrahamson their proportion of the purchase price. In December, 1889, Hourn mortgaged the creamery at Rushford to other creditors to secure payment of firm debts to them severally.

On January 17, 1890, Hourn made an assignment of his non-exempt property and of the partnership property to the plaintiff, Swen L. Thompson, in trust for creditors, under Laws 1881, ch. 148, as amended. The property which Hourn assigned was valued at \$2,621.09. Debts were proved and allowed to the amount of \$7,531. The assignee commenced suit against Pederson to recover the dray property, but was defeated and judgment was entered for defendant therein. He also brought this action March 29, 1890, against Hourn and the purchasers of the creamery at Houston, to recover that property, or its value, and for the use of it meantime, claiming that the sale to them was made with a view of giving his creditors, Johnson, Nash and Abrahamson a preference over his other creditors, and that the defendants, Onstad, Olander and Lilly knew of and aided in procuring such preference.

The issues were tried November 16, 1891, before *Hon. John Q. Farmer, J.* Defendants offered in evidence the judgment roll in the case against Pederson, but it was excluded and they excepted. The Judge made and filed findings on December 28, 1892, and directed judgment for plaintiff that he recover the property and \$20 per month for the use of it from December 7, 1889, until restored, and in case the property has sustained waste or damage, such additional sum as will make the same good. In case it is not, or cannot be, returned that he recover of defendants \$2,500, its value when they

took it with interest from that time with costs. Judge Farmer's term of office expired and a motion was made before his successor by defendants for a new trial. The motion was denied and they appeal. The discussion here was mainly on the evidence, whether it justified the finding that the purchasers had reasonable ground to believe that Hourn was insolvent and purchased with intent to give a preference to Johnson, Nash and Abrahamson.

*W. H. Harries, S. B. McIntire, G. W. Rockwell, and Wells & Hopp, for appellants.*

*H. S. Bassett, for respondent.*

GILFILLAN, C. J. There can be little doubt that at the time of the alleged preference the concern of Hostvet & Hourn, conducted by Hourn as surviving partner, was, and for some time had been, a losing and failing concern, and had reached that stage when it did not and could not pay its debts as they matured in the usual course of business. Where such is the case, it is a matter of no consequence that in the opinion of the debtor or of any one else he is not insolvent. A witness' testimony that a debtor is solvent is of very little weight without knowing what he regards as insolvency. And the evidence would justify a finding that all the property the concern had, and all Hourn had, taken at its full value, was insufficient to pay its and his debts. The finding that he and the concern were insolvent was therefore justified by the evidence.

The finding as to insolvency, and the judgment in the case of this plaintiff against Pederson, were not only not *res adjudicata*, but they were not even evidence on the point, not being between the same parties.

There can be no doubt either that Hourn knew the pecuniary condition of himself and the concern, so that when he paid in part, at any rate, one creditor, by a transfer of property of the concern, knowing he could not pay all the debts as they matured, he knew he was giving a preference to that creditor, and he must be presumed to have intended it. *Hastings Malting Co. v. Heller*, 47 Minn. 71, (49 N. W. 400.)

The court found that the defendants Johnson, Abrahamson, Onstad, Nash, Olander, and Lilly, to whom Hourn transferred the property, received the transfer as copartners, and have ever since

owned and held it, and now hold and own it, as such; and that in the negotiation for the purchase Johnson was and acted as the agent for the others.

On the question whether Johnson's knowledge of the facts was attributable to the others it is immaterial whether, in negotiating for the transfer, he was acting as a partner or was only agent for the others, there being no partnership.

But the evidence clearly shows a partnership. The six agreed that each should contribute a specified sum, and that they would purchase the plant and business and carry on the business. The purchase was as much a part of the enterprise they agreed to undertake as the carrying on the business after the purchase, and it was consequently a partnership transaction.

And, aside from that mode of bringing notice to the defendants, the evidence justified the further (twelfth) finding of fact that at the time of the transfer each of the defendants had reasonable cause to believe the debtor to be, individually and as surviving partner, insolvent. The evidence in that line was probably as scant in regard to Lilly as to any other of the defendants. It appears that a few days before the transfer to defendants an effort was made to form an association of farmers to purchase the property and business, and that two or three meetings were held for the purpose, at one of which, at any rate, Lilly was present, and was appointed one of a committee to appraise the value of the plant and business; and at that meeting, Anderson, the administrator of Hostvet, the deceased partner of Hourn, made a statement to the effect that the concern was in shape that they wanted to sell, and to have formed for the purpose a stock company of farmers to buy, and by doing so they would be "straightened up" if each man they owed took shares to the amount they owed him, from which the natural inference was that they could settle with their creditors only by selling to them their property and business for the amount they owed. Such a proposition is so unusual, so out of the ordinary course of business, as to put one to whom it is made on inquiry as to the financial condition of the person making it. And what, in such case, will put an ordinarily prudent man on inquiry will, unless he make such inquiry, charge him with notice of the facts that proper inquiry would have disclosed. *Daniels v. Bank of Zum-*

*brot*, 35 Minn. 351, (29 N. W. 165;) *Holcombe v. Ehrmanntraut*, 46 Minn. 397, (49 N. W. 191;) *Dow v. Sutphin*, 47 Minn. 479, (50 N. W. 604.)

The finding of fact that the concern owed Johnson \$2,100 is also excepted to as not sustained by the evidence. The books showed that the concern owed him more than that, and the explanation of the books offered by defendant, and contradicted by plaintiff, that some credits to Johnson represented not what was owing to him, but what was owing to somebody else, was not so satisfactory that the court was bound to accept it. Stating the matter most favorably for defendants, there was a conflict in the evidence, and the decision of the court below upon it is final.

The court found as a fact that the transfer was made with a view to give a preference to Johnson, Abrahamson, and Nash, each of whom was a creditor of the insolvent debtor; and also that it was made and received with the intent on the part of the vendor and vendees, respectively, of evading the provisions of the insolvency laws.

As to the three defendants above named, the transfer was, of course, void; and it would not have aided the transfer had either of them, in order to effect the preference, paid in money any part of the price agreed on for the transfer. It could not be, as to any one of them, partly void and partly valid. It may be that, had any one of the defendants paid to the debtor money for his part of the price, without knowing that a preference was to be effected by the transfer, his interest in the property would be protected; but there can be little doubt on the evidence, even aside from the relation of partners between the transferees, that each of them knew one purpose of the transfer was to make a preference, so that no one of them could claim to be a *bona fide* purchaser, and to be protected. No one of them knowing that the purpose was unlawful, and paying money to accomplish it, for the benefit of those preferred, would stand in any better position than would the preferred creditor who paid part of the price in money in order to gain a preference.

The transfer was therefore void as to all the defendants to whom it was made. When ascertained and adjudged to be void, it was void as of the date it was made; and the defendants were, therefore, chargeable with the value of the use of the property, and also

for any damage or waste done to the property while in their possession.

The direction for judgment contemplates, however, the allowance of such value of the use and of the damages or waste only in case the property is restored to the assignee. If it cannot be, then the value, with interest from the date of the transfer, is to be recovered. The direction is proper. It is true the amount of damages, if any, is not ascertained so that it can be, at first, inserted in the judgment. But if, when the property shall be restored, it shall appear to have been damaged, the court may ascertain the amount thereof, and modify the judgment accordingly.

Order affirmed.

(Opinion published 57 N. W. Rep. 223.)

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JOHN T. SMITH *et al.* vs. JAMES S. PARSONS *et al.*

Argued Nov. 13, 1898. Affirmed Dec. 18, 1893.

No. 8419.

**The test of usury.**

The test of whether a contract is usurious is, will it, if performed, result in securing to the lender a greater rate of interest than is permitted by law?

**Interest at ten per cent. a year on the money actually loaned is all the law allows.**

When a "bonus" is exacted by the lender as a consideration for making a loan, it is, in computing, for the purpose of determining whether the loan is usurious, to be deducted as of the date when it is payable. If payable at the time of the loan, it is to be deducted from the principal as of the date of the loan, and the remainder, or what the borrower receives and retains, is to be taken as the basis for computation.

**Mortgage, securing excepted paper, is not excepted.**

A certain loan contract *held* usurious. The exception of bona fide purchasers of negotiable paper in Laws 1879, ch. 66, § 3, from the operation of the usury law does not extend to a mortgage to secure such paper.

**Parties may stipulate that their contract shall be construed by the law of the residence of borrower.**

The borrower lived in this state. The real estate was situated here. The notes and mortgage were made here, and sent to Connecticut, where

55	520
58	475
55	520
62	413
55	530
65	120
65	479
55	520
70	389

the lender lived, for him to examine, and determine if he would accept them as security for the loan, and he there accepted them. The notes were payable in Connecticut. *Held*, the parties might stipulate that the notes should be construed by the laws of this state.

Appeal by defendants, James S. Parsons and others, from an order of the District Court of Cottonwood County, *P. E. Brown, J.*, made August 14, 1893, denying their motion for a new trial.

The plaintiffs, John T. Smith and Jennie Smith his wife, made their promissory notes, ten for \$1,000 each, and twenty for \$500 each, all dated October 1, 1883, due five years thereafter, and bearing interest at the rate of seven per cent. a year payable semi-annually. They also made a mortgage on lands in Cottonwood, Jackson and Murray Counties, securing payment of the notes. They sent these notes and the mortgage with abstracts of title to defendant, James S. Parsons of Hartford, Conn., for approval. He accepted the securities and agreed on February 21, 1884, to make the loan. He advanced portions of the money from time to time and it was used to pay off prior incumbrances on the mortgaged property. Parsons sold a part at least of the notes, but never assigned the mortgage or any interest in it. On December 13, 1883, James S. Morgan purchased from Smith four of the notes of \$1,000 each, and paid in good faith \$4,000 for them. Smith paid interest on all the notes to October 1, 1890. In August, 1891, Parsons commenced foreclosure by advertizement, under a power of sale in the mortgage. Smith and wife then brought this action to restrain the sale, claiming the mortgage to be usurious. The trial Court found upon the evidence adduced at the trial:

"That it was agreed between Parsons and Smith on February 21, 1884, that Parsons would then accept said mortgage and notes and make to the said plaintiff, John T. Smith, thereon, as of that date, a loan of twenty thousand dollars; that the payment of said sum should be deferred, and that the same should be paid over to said Smith in installments convenient to the defendant Parsons at times to be thereafter fixed by him, and as a consideration for said loan, in addition to the interest on said notes according to their terms, said Smith agreed to pay to said Parsons a commission of \$1,000 and perform services of the value of \$500 in soliciting life insurance, and that said Smith should pay interest on said notes from their

date at the rate of seven per cent. per annum according to their terms. That thereafter on November 4, 1884, Smith paid to Parsons the commission of \$1,000, and that between April, 1883, and the fall of the same year Smith performed services concerning the obtaining of insurance risks of the value of \$500. That the agreement to defer the payment on the loan, to pay the bonus of \$1,000, to perform services in obtaining life insurance risks, to pay interest on money before received, and not received, were devices entered into to evade the usury laws of this State, and were mere covers for usury. That the mortgage described in the complaint and herein described is usurious, and void."

The defendants made a case containing all the evidence and it was settled, signed and filed. On it and the pleadings, findings and files, the defendants moved for a new trial on the ground that the findings were not supported by the evidence and that the conclusions of law were not supported by the facts found. This motion was denied and defendants appealed. The discussion here was mainly upon the evidence, whether or not it supported the facts found in the Court below.

*J. G. Redding and Charles C. Willson, for appellants.*

By the sale of four of the notes to Morgan December 13, 1883, Smith accepted the securities and agreed to make the loan. This was before there was any negotiation for a bonus. Immediately after Morgan bought his notes, that mortgage had existence as a contract, and Morgan had a right to look to it for his security. The contract to pay \$1,000 commission was made February 21, 1884. This was at least two months after the mortgage had become a valid security. And if the agreement made February 21, 1884, was void for usury, it did not invalidate the previous contract made by Parsons' acceptance and sale of the notes to Morgan and others. A contract not usurious at its inception cannot be rendered invalid by any subsequent usurious negotiation. *Avery v. Creigh*, 35 Minn. 456; *Stein v. Swenson*, 44 Minn. 218; *Drury v. Morse*, 3 Allen, 445; *Nichols v. Fearson*, 7 Pet. 103; *New York Fire Ins. Co. v. Ely*, 2 Cow. 678.

Usury, being a defense highly penal in character, must be set forth in the answer and strictly proved at the trial. No infer-

ences will be indulged to sustain the defense. It will not avail the party if the usury proved is not that set up in the answer; nor will it avail him to make out a case which leaves the question in conjecture, and does not certainly show that usury was contracted for at the time the loan was made. *Manning v. Tyler*, 21 N. Y. 567; *Vroom v. Ditmas*, 4 Paige, 525; *Frank v. Morris*, 57 Ill. 138; *Sujette v. Wilson*, 13 Ore. 514; *Ewing v. Howard*, 7 Wall. 499; *Chase v. New York M. L. Co.*, 49 Minn. 118; *Thomas v. Murry*, 32 N. Y. 605.

If the full amount of interest reserved and commission exacted at the time the contract for the loan was made, spread over the whole term of five years, do not exceed ten per cent. a year, payable yearly, and in advance each year, then the contract is not corrupt or usurious within our statute. Laws 1879, ch. 66. The bonus will be spread over the entire five years. *Upton v. Donahue*, 32 Neb. 565; *McGovern v. Union M. L. Ins. Co.*, 109 Ill. 151; *Chase v. New York M. L. Co.*, 49 Minn. 111; *Brown v. Scottish-American Mortg. Co.*, 110 Ill. 235.

Parsons is a trustee and holds the title to the mortgage with power to foreclose for the benefit of the other defendants who hold the notes. Parsons was the proper person to foreclose the mortgage by advertizement. *Burke v. Backus*, 51 Minn. 174; *Brown v. Delaney*, 22 Minn. 349; *Bottineau v. Aetna Life Ins. Co.*, 31 Minn. 125; *Solberg v. Wright*, 33 Minn. 224.

The notes having been delivered in Connecticut and being payable in that State are governed as to usury by the laws of that State, and as the burden of showing usury was upon the plaintiffs, they should have shown the statute of that State in evidence. There is in fact no usury law in Connecticut. 1 Jones, Mortg. §§ 656, 657; Story, Conflict Laws, §§ 291, 292, 293, 294; Bishop, Contracts, §§ 1374, 1390; *Wane County Sav. Bank v. Low*, 81 N. Y. 566. But there is a clause in the notes that they are made under, and are to be construed by, the laws of Minnesota. Will this clause import our usury laws into the contract. 1 Jones, Mortg. §§ 658, 660, 661, 663; *Townsend v. Riley*, 46 N. H. 300; *Dugan v. Lewis*, 79 Tex. 246; *Mott v. Rowland*, 85 Mich. 561; *Kilcrease v. Johnson*, 85 Ga. 600.

This bonus of \$1,000 was part of the compensation for the loan and was so applied. It cannot be taken out of the principal; cer-



tainly not before the bonus was paid on November 4, 1884, nor can it be taken out then, without making a new contract between the parties, and making it, too, for the purpose of destroying the contract they did make, and forfeiting the money loaned. *Leonard v. Cox*, 10 Neb. 541; *Mathews v. Toogood*, 25 Neb. 99; *Tepoel v. Saunders Co. Bank*, 24 Neb. 815; *Upton v. O'Donahue*, 32 Neb. 565; *Chuse v. New York M. L. Co.*, 49 Minn. 111.

*Wilson Borst and Loren Cray*, for respondents.

In order to determine the character of the transaction between the parties and dispose of the question of usury, two aggregate sums must be arrived at: First, the amount actually received with interest thereon from the time when received, at the highest rate known to law. Second, the amount they contracted to pay of both principal and interest. If the latter sum is greater than the former then there is usury. In view of the fact that it was contracted that Smith should not receive the money at the date of the notes, the most that defendants can claim is that interest should be cast on the amounts received from the time they were received, at ten per cent., until the maturity of the contract, viz: October 1, 1888. If Smith has contracted to pay more than this, it is surely usury. Where a portion of the money loaned is withheld, the borrower paying interest from the time the transaction took place, it is usury, at least if the result was the receipt of unlawful interest. *East River Bank v. Hoyt*, 29 How. Pr. 280; s. c. 32 N. Y. 119.

Now what did plaintiffs contract to pay? First, \$20,000 of principal, as per his notes; five years' interest at seven per cent., \$7,000; bonus, \$1,000; services in procuring insurance, \$500; total, twenty eight thousand five hundred dollars (\$28,500). This exceeds by \$1,157.64 the total amount of money received with ten per cent. interest on it from the time received until the expiration of the loan.

Returning to the lender a part of the sum on which interest is reserved, reduces the contract to a loan of the residue, and the money returned is a discount. *Oyster v. Longnecker*, 16 Pa. St. 269; *Collamer v. Goodrich*, 30 Vt. 628; *Landis v. Saxton*, 89 Mo. 375; *Blymyer v. Colvin*, 127 Pa. St. 114.

Where the rate of interest in the State in which the contract is

made, and in the State in which it is to be performed, differ, the parties may contract for the rate of interest at either place. Note in 6 Am. Dec. 193; *Martin v. Johnson*, 84 Ga. 481; *Mott v. Rowland*, 85 Mich. 561.

GILFILLAN, C. J. Action to enjoin the foreclosure under the power of a mortgage upon real estate alleged to have been usurious. Smith executed to Parsons thirty promissory notes, aggregating in amount \$20,000, and he and wife executed a mortgage upon real estate situated in this state to secure the same, all dated October 1, 1883, and payable October 1, 1888, with interest, payable semi-annually, at the rate of seven per cent. per annum. The mortgage was duly recorded. The papers were executed, not upon a loan made at the time, but upon an application to Parsons for a loan; and they were forwarded from Minnesota, where Smith resided, to him, at Hartford, Conn., in which state he resided, for his examination and acceptance or rejection; and a considerable time appears to have elapsed between their execution and Parsons' determination to accept them, and make the loan. On the trial the facts were found that at the time of agreeing to the loan, and as part of the transaction, Smith agreed to pay, and he afterwards paid, to Parsons, as a bonus or commission for making the loan, 5 per cent. on the \$20,000, and also to render certain services, which he did render, and which were of the value of \$500. The loan was not paid to Smith at once, but, according to the testimony of one witness, the agreement was that, if enough of it to satisfy one prior lien on the property (amounting to \$3,947.18) were paid at once, the remainder might be paid within a reasonable time; according to another witness, that, on enough to satisfy that lien being paid, the remainder might be paid in installments convenient to Parsons. The jury, to whom certain questions were submitted, found, as they had a right to do, the fact to be as testified by the second witness. The court also made findings of fact, among them that the loan was accepted February 21, 1884; that the agreement was as follows: "That said Parsons would then accept said mortgage and notes, and make to said plaintiff John F. Smith thereon, as of that date, a loan of twenty thousand dollars; that the payment of said sum should be deferred, and that the same should be paid over to said Smith in installments

convenient to the defendant Parsons;" that the two bonuses we have mentioned should be paid, and "that said Smith should pay interest on said notes from their date at the rate of seven per cent. per annum, according to their terms;" and also "that said agreement to defer the payments on said loan, to pay the bonus of one thousand dollars for the services of Smith in obtaining life insurance risks, to pay interest on money before received and not received, were devices entered into to evade the usury laws of this state, and were mere covers for usury."

The notes were made payable at Hartford, and in them was this clause: "It is expressly agreed and declared that these notes are made and executed under, and are in all respects to be construed by, the laws of the state of Minnesota."

The findings of fact above quoted, leaving out the last quotation, which consists of an inference from the other facts, were fully sustained by the evidence. Parsons may have concluded—probably had—to accept Smith's application, and make the loans, prior to February 21st, but he did not communicate his decision to Smith until that date.

To be usurious, a contract must be so when it is made. It cannot be made so by any default to carry out its provisions; so that the fact that in some way, not explained, there was a failure to advance to Smith about \$1,000 of the amount agreed, that not being contemplated by the agreement, is not to be taken into account in determining whether it was usurious. The test of that question is, will the contract, if performed, result in producing to the lender a rate of interest greater than is allowed by law, and was that result intended?

When the agreement exacts from the borrower a "bonus" to be paid to the lender for making the loan, that, on the question of usury, must be taken out as of the date when it is to be paid by the terms of the agreement. If payable at the time of advancing the loan, it is for the purpose of determining what rate of interest the agreement reserves to the borrower, to be deducted as of that date from the amount of loan nominally agreed on, and the computation of interest made on the remainder. The law is not bound by the names parties apply to their transactions, but it regards the substance and effect of what they do or agree to do. So if A. and B.

agree that A. shall loan to B. a certain sum, and that B. shall at the same time pay a certain sum to A. as a consideration for making the loan, it is in substance and effect an agreement to loan the difference between the two sums.

And, though the parties call it "interest in advance," if it will result in reserving to the lender a rate greater than the rate permitted by law on the amount to be actually retained by the borrower, it is usury. The only exception to this is that provided for in the clause in Laws 1879, ch. 66, § 3, in force when this loan was made, as follows: "Provided that the payment of interest in advance for one year at a rate not exceeding ten per centum per annum shall not be construed to be usury." This was, doubtless, inserted in reference to the custom among bankers of taking interest in advance, calculated, not on the sum the borrower will receive and retain after taking out the interest, but on the principal sum he agrees to repay at the end of the term. When calculated in that way, the borrower pays more than the agreed rate on what he actually gets. If the agreed rate be 10 per cent., he pays more than 10 per cent. on what he gets, and that would be usury, but for the above clause. The clause sanctions that mode of calculating interest when paid in advance, limiting the time, however, for which interest at the permitted rate may be so calculated and taken in advance to one year. In all other cases the retaining by the lender of interest calculated in that way will be usury if the amount retained be more than the permitted rate on the amount the borrower receives and retains.

The agreement that the money should be advanced to Smith, after the first installment, in installments at the convenience of Parsons, could not be construed to leave to the latter to determine what dates and amounts would be convenient for him, nor to justify him in taking no steps to make it convenient to advance the installments. The construction, if it were necessary to make one, would probably be that the installments were to be advanced at times and in amounts reasonable in view of the purposes for which the money was borrowed, if known to the lender.

The money, after the first installment, was advanced by Parsons to Smith on different dates, and in different amounts; the last—which they seem to have regarded as making up the full advance of \$20,000—being November 4, 1884. This may be taken as a practical

construction of the agreement, and as establishing what were the convenient or reasonable times and amounts contemplated by it. We are to assume, therefore, that the agreement contemplated that the last installment should be paid November 4, 1884.

No times were agreed on for the payment of the bonuses, but, as they were to be paid for making the entire loan of \$20,000, we must assume the parties, intended they should be paid when that sum was made up by the various installments.

These considerations furnish a basis for making a computation to ascertain if the interest or compensation for the use of the money actually to be received and retained by the borrower was at the rate of more than ten per cent. per annum on that amount or those amounts. The interest on the several amounts, at that rate, from the dates of the advances to the time of paying the last installment, November 4, 1884, was about \$930. By the terms of the notes there was payable on and before October 1, 1884, as interest, \$1,400. It is a mode of computation which defendants cannot complain of, to deduct the bonuses from the principal \$20,000 as of the date of November 4, 1884, and calculate the interest on the remainder, \$18,500, at the rate of ten per cent. from that date to the maturity of the notes; add the \$930 to that, and to their sum add the principal retained by the borrower, \$18,500, aggregating \$26,553, and compare that with what by the terms of the notes and mortgage the borrower was to repay to the lender, \$20,000 principal, and \$7,000 interest. The usurious character of the transaction is apparent.

The clause in Laws 1879, ch. 66, § 3, above referred to, excepting *bona fide* purchasers of negotiable paper from the operation of the usury law, is confined to the paper itself, and does not extend to a mortgage given to secure such paper. That is in accordance with what this court has always held in regard to securities for commercial paper in the hands of a *bona fide* purchaser. It has always held that the privileges and immunities belonging to that kind of paper do not extend to a mortgage given to secure it, and we must presume the legislature had that rule in view when enacting the usury law. The purpose was evidently to preserve to such paper, where tainted with usury, the same immunities and exemptions as apply to the same kind of paper in respect to other defenses.

It is in accord with the weight of authority and with principle

that where two parties make a contract of loan in one state to be performed in another they may, acting in good faith, and without intent to evade the law, agree that the law of either state shall control as to the rate of interest. 2 Kent, Comm. (12th Ed.) 460; *Robinson v. Bland*, 2 Burrows, 1077; *Miller v. Tiffany*, 1 Wall. 298.

When parties living in different states execute a contract in one, or partly in one and partly in the other, and it is to be performed in the other, it has often been a matter of great nicety to decide by the law of which state the contract is to be construed, and its validity determined. In the reports are a vast number of cases in which the question has arisen. Parties ought to be permitted, when making their contract, to avoid such question by determining for themselves, especially where, had they taken the trouble, they might have executed the contract in the state in which they have provided it shall be performed, or might have provided for its performance in the state where executed.

In this case the makers of the notes and mortgage lived in this state, the land mortgaged is situated here, the instruments were made here; and, notwithstanding they were to be accepted as security for the loan in Connecticut, and the notes were payable there, we think it was competent for them to agree, when making the contract, that its construction and validity should be determined by the law of this state. This makes it unnecessary to determine by the law of which state it would have to be decided had they not so agreed.

The assignment of error upon rulings of the court admitting or excluding evidence, and on findings of fact other than as to the facts herein recited, need not be considered, for such evidence and findings could have no bearing on the question decisive of the case—that of usury.

Order affirmed.

(Opinion published 57 N. W. Rep. 311.)

v.55M.—34

**HEWSON-HERZOG SUPPLY CO. vs. MINNESOTA BRICK CO.**

Argued Nov. 24, 1893. Affirmed Dec. 21, 1893.

No. 8479.

**The facts stated.**

The plaintiff was a jobber in buying and selling brick at St. Paul and Minneapolis, and bargained with defendant, a manufacturer of brick at Wheeler, Wis., for its entire output of brick, to be delivered on board cars at the place of manufacture for a certain price named, with specified freight charges to St. Paul and Minneapolis added, with a view on the part of plaintiff of reselling said brick to builders and contractors at a profit. The defendant was unable to fulfill the conditions of the contract, and the plaintiff brought suit to recover damages for the breach of the contract. St. Paul and Minneapolis were the market places for the kind of brick mentioned in the contract.

**Measure of damages for breach of contract to sell and deliver goods.**

*Held*, that the measure of damages was not the difference between the contract price of the brick and the price which the plaintiff, as jobber, could sell them for to builders and contractors at the places named, but the difference between the contract price of the brick furnished in the quantities and at the periods mentioned in the contract, and the market value of the brick at those places, which it would have to pay, as jobber, for brick of a similar kind, and in the quantities which and at the periods when it was entitled to receive them under its contract.

**As of what time damages should be assessed.**

*Held*, also, that it could not recover damages for such breach of contract in one lump sum, but only such damages as accrued at the different times of defendant's default in not furnishing brick of the kind, and in the quantities, which it was also entitled to receive under the terms of the contract.

**The difference between the contract price and the market price, the measure of damages.**

It appearing in this case that the plaintiff, at all times during the existence of the contract, had the right and power to procure of another brick company the kind and quality of brick called for by the contract in question, at such times as it needed them, at St. Paul and Minneapolis, *held*, that the measure of damages was the difference between the contract price of the brick and the price which plaintiff, as a jobber, necessarily paid such other company for such brick at the places above named.

Appeal by plaintiff, Hewson-Herzog Supply Co., a corporation, from an order of the District Court of Ramsey County, *Chas. E. Otis, J.*, made March 14, 1893, granting a new trial.

The defendant, the Minnesota Brick Company, a corporation, made a contract with plaintiff April 1, 1890, to manufacture during the season and deliver to plaintiff on board cars at Wheeler, Wis., 3,000,000 good merchantable pressed brick and as many more as it could make that season up to 6,000,000, for which plaintiff was to pay \$13.50 per thousand. If freight from Wheeler to St. Paul should be more than \$2.50 per thousand, the excess was to be deducted from the price. Defendant failed to make pressed brick of the character and quality required by the contract and this action was to recover damages for breach of the contract. At the trial January 12, 1893, the Judge directed the jury to return a verdict for plaintiff for \$26,415 and it was done. Defendant excepted and moved for a new trial, and it was granted. From that order plaintiff appeals.

*Fletcher, Rockwood & Dawson*, for appellant.

*Young & Lightner*, for respondent.

Buck, J. This action was brought to recover damages on account of defendant's failure to manufacture and deliver brick to the plaintiff according to the conditions of a written contract made between the parties, and dated April 1, 1890. Upon the trial the court below directed the jury to find a verdict in favor of the plaintiff for the sum of \$26,415. Subsequently, on defendant's motion, the court granted a new trial, upon the ground that the evidence as to damages was insufficient, and from this order the plaintiff appeals.

The contract provides that the defendant shall manufacture and sell to the plaintiff, during the season of 1890, all the pressed brick to be made by the defendant at its yards at Wheeler, Dunn county, Wis., and to burn, and have ready for shipment during the season commencing on or before June 9, 1890, good merchantable pressed brick, equal in all respects to the best stock brick of the St. Louis Hydraulic Press Brick Company of St. Louis, Mo., in weight, finish, and trueness, and of color equal to the samples, to the number of not less than 3,000,000, and as many more as defendant could



make, up to the number of 6,000,000, and to ship in accordance with instructions of the supply company, and furnish daily reports of bricks made, and shipped, and on hand.

The plaintiff was to sell and dispose of the brick in any market it deemed best, and to pay defendant \$13.50 per thousand for such brick on board cars at defendant's yards at Wheeler, Wis., upon the basis of \$2.50 per thousand for freight to St. Paul or Minneapolis, and, if the freight was greater than this amount, the difference should be deducted from the \$13.50 per thousand for the brick. The payments were to be made monthly in cash on all brick sold and delivered during the current month, and plaintiff was to sell for immediate delivery the brick so manufactured as soon as they were made and ready for shipment, and to sell on or before January 1, 1891, not less than 3,000,000 pressed brick, and as many more as possible, up to the total amount of the output of defendant. The defendant made various attempts to manufacture the brick mentioned in the contract, but did not succeed, and it was unable to furnish the plaintiff with the amount of brick required by the terms of the contract, only a few thousand being furnished. By reason of this failure, the plaintiff alleged that it was damaged in the sum of \$27,000. In its memorandum attached to the order granting a new trial, the court below states as the ground for so doing that the evidence as to damages was insufficient to support the verdict. This view of the case is fully warranted by the record, and we cannot see how the court could properly have done otherwise. There were several erroneous rulings of the court below in the admission and exclusion of evidence, which finally led up to the order directing the jury to find a verdict for plaintiff, whereby his rights were greatly prejudiced.

It appears that the defendant was a manufacturer of brick, and the plaintiff a jobber, middleman, or wholesale dealer, bargaining for the entire output of the defendant's yards, with the view of reselling the brick at a profit. To more fully understand the situation of the case, we state that it appears from the evidence that the officers or agents of the respective parties, at the time of the making of the contract, had their offices in the same room in a building in the city of St. Paul, and so continued until some time in the month of November, 1891, and that plaintiff had the ex-

clusive agency or contract with the St. Louis Hydraulic Press Brick Company for some time prior to the date of the contract between these parties, and during the entire period covered by the contract, and for a long time thereafter, under which it was enabled to purchase and did purchase, brick of the character in suit at the price of \$16 per thousand at St. Louis, the freight thereon from St. Louis to St. Paul and Minneapolis up to September 1, 1890, being \$5.51, making the cost price in those places \$21.51, and from that date to January 1, 1891, \$6.03, making the cost price at same places \$22.03. The St. Louis Brick Company was a large manufacturer of this kind of brick, and was always able, ready, and willing to fill, and did fill, all such orders for this kind of brick for the plaintiff as it desired, and which brick plaintiff was at liberty to sell at St. Paul, Minneapolis, and in the cities of Stillwater, St. Cloud, and smaller places in the surrounding country, except that it was not permitted to sell the St. Louis brick at Duluth or Superior.

On the trial the plaintiff was permitted to show by two witnesses, against the objections of defendant, that the market value of the pressed brick of the character described in the contract was \$28 per thousand at Minneapolis, but on cross-examination they testified that this price or market value was that which the jobber or agent charged to the builder, and not the price or value of such brick when sold by the manufacturer to a jobber or agent, and that as to such prices or values they had no knowledge. Upon this subject no other testimony was given by plaintiff, although its principal managing officers were examined as witnesses upon the trial. A witness for the defendant testified that there was a difference in the market price or value of brick sold by the manufacturer to the jobber or agent, and the price or market value of brick sold by the jobber or agent to the builder or contractor, which evidence was not disputed.

The court below held the measure of damages to be the difference between the contract price of the brick delivered in St. Paul or Minneapolis, viz. \$16 per thousand, and the price which the jobber or middleman charged or sold the brick to the builder or contractor, viz. \$28 per thousand, but limited the amount of the recovery to \$9 per thousand, because the plaintiff only demanded that amount in its pleadings. In cases of this kind, no more dam-

ages can be recovered than such as were within the contemplation of the parties when the contract was entered into, and which would likely result from a breach thereof; for the familiar rule may be applied here "that the intention of the parties is to be ascertained from the whole contract, considered in connection with the surrounding circumstances known to both parties." It cannot be reasonably or legally claimed that these parties ever contemplated that, if the defendant was unable to perform the conditions of its contract, the measure of damages should be the difference between the price of the brick to the plaintiff at St. Paul or Minneapolis, viz. \$16 per thousand, and the price which the plaintiff, as jobber, charged or sold the brick for to the builder or contractor. Such a rule or measure of damages would compel the defendant to pay the plaintiff all the expense of carrying on its business, including the value of time spent, costs of handling, and other incidental expenses attending the sale of 3,000,000 brick at retail, for a period of nine months at least, the time covered by the contract. The result would also be that the plaintiff would receive a greater sum as damages by reason of the defendant's default than it could obtain as profits if the defendant had performed all the conditions of its contract with plaintiff. This is not the compensation as damages which the law permits by reason of the breach of a contract. The rule stated as law in 1 Sutherland, Dam. 17, is this: "This universal and cardinal principle is that the person injured shall receive a compensation commensurate with his loss or injury, and no more; and it is a right of the person who is bound to pay this compensation not to be compelled to pay more, except costs."

Plaintiff was not entitled to recover, as damages, any greater sum than the difference between the contract price of the brick at St. Paul and Minneapolis, viz. \$16 per thousand, in the quantities and at the periods mentioned in the contract, and the market value at those places which it would have to pay as jobbers or middlemen for brick of a similar kind, and in the quantities which it was entitled to receive under its contract, *Grand Tower Co. v. Phillips*, 23 Wall. 471; and this rule of damages must be qualified as to this case by another one, to be stated hereafter.

The plaintiff was not entitled to recover the damages, in one

lump sum, which resulted from the defendant's breach of contract, for all of these brick were not to be delivered at one time, nor in one gross or total quantity, but in different quantities and at different periods. The rule seems to be pretty well settled that where, under a contract of sale, goods are to be delivered at certain specified periods and in specified quantities, and as such period arrives, if no delivery or only a partial delivery takes place, the damages are to be estimated as of those periods when such contract ought to have been performed. Wood's Mayne, Dam. § 206. And the rule is there further stated that "if the defendant absolutely repudiates his contract at any period previous to the final date specified, and the plaintiff elects to treat the contract at an end, yet in considering the question of damages they will still be estimated with reference to the times at which the contract ought to have been performed." If this were not the rule, there might be great injury and injustice done to a party where the periods of performance extended through a great many years, and the market prices or values might vary during the different periods of performance of the contract.

We are also of the opinion that the court below erred in striking out the evidence in regard to the conditions existing between the plaintiff and the St. Louis Brick Company. That there was a breach of the contract between these parties on the part of the defendant was well established, and the question to be determined is as to the extent of the defendant's liability upon such default. There was neither fraud, nor intent on its part to produce such default, but, on the contrary, it seemed to make great effort to fulfill its duty and obligations to the plaintiff in this respect. In such case it was the duty of the plaintiff to render the injury or damages as light as possible. It could not, by its negligence or by its want of reasonable exertion, unnecessarily enhance the amount of damages to which the defendant would be liable by reason of its breach of the contract.

When a party is injured by nonperformance of a contract, especially of the kind existing between these parties, the other party, if he has it in his power, is bound to lessen the damages if he can do so by reasonable exertions, and, if he is necessarily compelled to perform more labor or put to greater expense, these are matters

which are properly chargeable against the party in default; and, if a party who is entitled to the benefits of a contract receives notice from the other party that he cannot perform its conditions, then it is the duty of such party to save the party in default, as far as it is in his power to do so, all further damages, though the performance of this duty may call for affirmative action. 1 Sutherland, Dam. 149-151.

And, where all the facts and surrounding circumstances are sufficient to fully satisfy the party not in default that the other party cannot and will not perform the conditions of the contract between them, he should also use reasonable exertions to save the party in default from further damages. It appears in this case that the plaintiff, at all times during the existence of this contract, had it in its power to procure brick of the St. Louis Brick Company, of the kind and quantity called for by this contract, at St. Paul or Minneapolis, with freight charges added, making the additional expense about \$6 per thousand. The quantities and kind of brick required or needed could always be obtained by the plaintiff without delay or trouble. It had an extensive territory in which to sell its St. Louis brick, and it does not appear that any of its customers ever complained of the price, or that they were not supplied in the quantity, and of the kind, and at the times needed by them.

The only difference to the plaintiff was the cost price of the brick at St. Paul and Minneapolis. The measure of damages, then, which plaintiff was entitled to recover, if upon the whole case it proved its cause of action, was the difference between the cost price of the defendant's brick, as shown by the contract, and the St. Louis brick delivered in St. Paul and Minneapolis, and which plaintiff had to pay for as jobber. This rule is, of course, applied to this case upon the evidence found in the record, and should not be rendered inapplicable by reason of the fact that the plaintiff was authorized to sell the defendant's brick in the cities of Duluth and Superior, some 150 miles distant from St. Paul and Minneapolis, but was prohibited from selling the St. Louis brick in those places. But the above measure of damages should be modified or qualified as to the amount of brick needed or required to supply the demands of its customers at Duluth and Superior, and upon another trial

it should be permitted to show, if it can do so, the amount of damage it sustained by reason of the defendant's default in not furnishing it with the quantity of brick needed to supply such customers at those places during the existence of the contract.

The plaintiff had no right, however, to demand of the defendant that the brick so to be manufactured should be delivered to it at Duluth or Superior, but only on the cars at Wheeler, Wis. It appears that St. Paul and Minneapolis were the market places, nearest to Wheeler, for such kind of brick. It may be difficult to establish a just measure of damages as between these parties in this case, in view of the complicated conditions existing as to the Duluth and Superior territory; but we think that the measure of damages, as applied to that territory, should be the difference between the contract price of the brick at Wheeler, Wis., viz. \$13.50 per thousand, with the cost of freight to those places or territory added, and the price which plaintiff could as a jobber or middleman procure brick for, at the lowest market value, or for a less price if reasonably possible, of a similar kind, and in sufficient quantities, and at the times mentioned in the contract, to the amount or quantity which it could sell or needed at those places. We construe the contract in question as one of sale, and not one of agency.

The order granting a new trial is affirmed.

(Opinion published 57 N. W. Rep. 129.)

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KEYSTONE IRON Co. *vs.* LILLIAN LOGAN *et al.*

Argued Dec. 7, 1893. Affirmed Dec. 21, 1893.

No. 8361.

**Recovery of earnest money paid by a vendee.**

Where B. executes a written instrument with L., who, as his wife's agent, signs her name to the instrument on a contract of sale of her real estate to B., and she receives part of the purchase money from him, he cannot recover it back from her, if she and her husband are ready, willing, and able to convey the premises to B. according to the terms of the written instrument or contract, even though it be absolutely void; and this is especially so if B. has not tendered full performance of his part of the contract.

Appeal by plaintiff, Keystone Iron Company, from a judgment of the District Court of St. Louis County, *Calvin L. Brown, J.*, entered July 21, 1893, directing that plaintiff take nothing by its action.

On February 24, 1892, the defendant, Lillian Logan, was the owner of the northeast quarter of the northwest quarter, and the northwest quarter of the northeast quarter of section twenty six (26) in Township 58, Range 18 in St. Louis County. On that day her husband, W. B. Logan, made a written contract signed in her name, by him as her agent, to sell the land to E. R. Brace for \$5,000 in cash and one thousand shares of stock of \$10 each in the Keystone Iron Company. Brace paid down \$500 and was to pay \$500 more in fifteen days. He was to pay \$1,000 in thirty days, \$1,000 in sixty days, \$1,000 in ninety days and \$1,000 in four months from delivery of patent from the United States for the land. It is further provided in the contract that if the title be found good and nevertheless it be not accepted by the purchaser, the \$500 earnest money should be forfeited.

The husband paid over the \$500 to his wife and she has ever since been ready and willing to perform the contract on her part. Brace assigned to the plaintiff all his right under the contract and all claims to the \$500 he had paid. Neither he or plaintiff ever offered to pay any more of the purchase price or ever demanded a conveyance. Plaintiff brought this action against Lillian Logan and her husband to recover the \$500, so paid by Brace. Plaintiff claimed that the contract of sale was void, because her husband could not be her agent to sell her land. (1878 G. S. ch. 69, § 4.) At the trial these facts appeared and the Court made findings April 23, 1893, and directed judgment to be entered that plaintiff take nothing by the action and that defendants recover their costs. Judgment was so entered and plaintiff appeals.

*R. R. Briggs*, for appellant.

*Jonn H. Boyle*, for respondent, cited *Sennet v. Sheehan*, 27 Minn. 328; *McKinney v. Harvie*, 38 Minn. 18; *McClure v. Bradford*, 39 Minn. 118; *McManus v. Blackmarr*, 47 Minn. 331; *Abbott v. Draper*, 4 Denio, 51; *Peck v. Burr*, 10 N. Y. 294.

BUCK, J. On the 24th day of February, 1892, the defendant W. B. Logan, the husband of the other defendant, Lillian Logan, executed an instrument in writing, by signing his wife's name thereto, as follows: "Lillian Logan. Per agent, W. B. Logan,"—in which instrument it is stated that she had received of one E. R. Brace \$500 on account of the purchase of eighty acres of land in St. Louis county, in this state, for the sum of \$5,000 cash and 1,000 shares of stock in company, of the par value of \$10 per share; the \$500 being earnest money, and \$500 cash to be paid in fifteen days, and \$4,000 in payments of \$1,000 in thirty days, \$1,000 in sixty days, \$1,000 in ninety days, and \$1,000 in four months, from delivery of patent.

It was further agreed that if the title was not good, and if Brace should refuse the same upon that ground, the agreement should be void, and then the defendants should return the \$500 earnest money, and the vendor should not be liable for the purchase money. If the title was found to be good, but nevertheless not accepted by Brace, then said \$500 earnest money should be forfeited, and the owner might declare the contract terminated. No further payments were made by Brace, and he notified the defendant Lillian Logan that the title to said land was not good, and that he refused to accept the same, and he did not on his part perform any of the other conditions in said instrument mentioned. Whatever right Brace had in and to the said earnest money so paid he assigned to the plaintiff, and this action was brought for its recovery.

Upon the trial the court below found that the defendant Lillian Logan was at the time of the execution of said instrument the owner in fee simple of said real estate, and had good title thereto, and had such title at the time of the trial; and at all times had been able, willing, and ready to convey the same in accordance with the terms of said agreement; and that she had fully authorized and empowered her said husband, W. B. Logan, to enter into said contract, and that at all times since the making thereof she had been ready and willing to fulfill and perform said contract in accordance with its terms and provisions, although the power and authority so given her said husband was verbal, and not in writing. The court further found "that the said contract was not procured by any false or fraudulent representations, nor is there anything to show that it was made or entered into under a mistake or misapprehension, either as to law



or the facts." With this finding of the court it is difficult to see as a matter of law how the plaintiff can recover back the earnest money which he voluntarily paid. The defendant Lillian Logan does not and never has refused to perform her part of the agreement. No default can be charged against her. She has been ready at all times to perform the obligations which were entered into by her husband in her behalf, and carry out the conditions of the written agreement to its fullest extent. When Brace accepted the agreement and paid the money he knew that Lillian Logan was a married woman, and that W. B. Logan was her husband. In this respect, then, there was not, and could not be, any fraud. Why, then, does Brace not perform his part of the contract, pay the purchase price, receive his deed, and complete the transaction? This would be good law as well as good morals, but, instead of doing so, and without tendering the payment of any of the purchase money due and payable and receiving his deed, he makes an assignment of the earnest money which he paid, and his assignee seeks to recover it of the defendant Lillian Logan, who in no way appears to be in default. This is done upon the theory that the agreement was not merely voidable, but absolutely void, because the husband, W. B. Logan, is prohibited by law from making any valid contract with his wife, relative to any of her real estate, either as agent or in relation to conveying the same or any interest therein. The wife makes no such objection, but in her pleadings and in open court declares her willingness to perform all the conditions in the agreement entered into in her behalf by her husband, and in the answer he asserts the same thing.

The plaintiff alleges that the defendant Lillian Logan cannot give a good title, because she cannot compel her husband to sign the deed with her. She alleges, and the court found, that she was ready and willing at all times to perform the conditions of the contract, which, of course, includes the conveyance by her and her husband of a good title. There is no evidence in the case tending to show that he declines or refuses to join with his wife in such conveyance, and the fair inference from the record is that he is willing to do so upon the payment of the consideration mentioned in the agreement. It does not appear that any demand was ever made upon him to sign a deed or join with his wife in

its execution. Instead of doing so, he serves a notice upon the defendant Lillian Logan that he will not perform the conditions of the agreement himself, and that he considered it duly terminated by reason of the title to the land not being good. It is needless, perhaps, to say that an agreement like this could not be thus summarily terminated by Brace so as to give him a right to recover back the consideration money which he had voluntarily paid. Conceding, as we do, that the agreement was void under our statute prohibiting such transactions relating to real estate on the part of a husband in behalf of his wife, yet if she had not violated the terms of the agreement, and she and her husband stood ready and willing at all times to perform the conditions of said agreement, with the ability to do so, we see no legal objections to her and her husband adopting the husband's act in making the agreement for his wife, and making such act their own joint act, and thus perform the terms set forth in the written instrument, although it was originally void, and to the extent that it could not be ratified. If they are willing to do this, Brace could not be injured, or his rights in any way be seriously affected.

The absolute invalidity of the agreement does not prevent her and her husband from performing its conditions, if they wish so to do, for there is nothing to be found therein which if performed would constitute a criminal or tortious act. It may be that the complete performance of the terms of this written instrument would prove of great pecuniary benefit to the wife, and to the husband also. And the absolute power is not vested in Brace to constitute himself the protector of the wife's rights, and say that she shall not perform the conditions of the agreement if she voluntarily chooses to do so. It seems to be a rather unusual proceeding for one party to a written proceeding to insist that he be permitted to disavow its terms because it is void as to the other party's rights therein. Valid acts may be done under a void contract.

It does not appear to be the fault of the defendants, or either of them, that the contract was not fulfilled. The first default was that of Brace in not paying the second installment of \$500 in fifteen days after the date of the written instrument. Brace never tendered to the defendants, or either of them, the money due in

accordance with the terms of the agreement, and never offered to perform the other conditions therein contained. If the agreement was valid in all respects, Brace could not compel performance, or recover back what he had paid, by refusal of defendants to perform, without first offering to perform on his part. And this court, in *Sennett v. Shehan*, 27 Minn. 328, (7 N. W. 266,) state the law to be "that this rule applies to all contracts with mutual and dependent covenants or promises, including alike parol contracts, void as such by the statute of frauds, and those not affected by the statute." It is immaterial whether the agreement is void under the statute of frauds, or otherwise invalid or nonenforceable by reason of the same having been signed on behalf of the wife, by the husband; yet, as it appears not to embrace the commission of a tortious, immoral, or criminal act, Brace could not recall his money until he tendered back the consideration, and even then he could not recover if the defendant Lillian Logan is willing, ready, and able to perform all of the terms of the written instrument, including, of course, the giving of a good title, her husband joining with her in the execution and delivery of the proper deed.

Of course, the plaintiff has no better or greater rights in the matter than Brace would have had if he had brought the action in his own name.

The judgment of the court below is affirmed.

(Opinion published 57 N. W. Rep. 156.)

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JOHN J. RHODES *vs.* RICHARD A. WALSH *et al.*

Argued Nov. 29, 1898. Reversed Dec. 21, 1898.

Nos. 8321; 8322.

A member of the Legislature is not exempt during a session from service of civil process.

Article 4 of section 8 of the constitution of the state of Minnesota provides as follows: "The members of each house shall in all cases except treason, felony and breach of the peace, be privileged from arrest during the session of their respective houses and in going to and returning from

the same." *Held* that, under said constitutional provision, a member of the legislature is not privileged from the service upon him of a summons in a civil action during a session of said legislature.

Appeal by plaintiff, John J. Rhodes, from an order of the District Court of Ramsey County, *Charles E. Otis, J.*, made April 12, 1893, vacating and setting aside the service of the summons in the action.

On March 20, 1893, plaintiff commenced this action against Richard A. Walsh, Ignatius Donnelly, P. B. Winston, James A. Boggs, Hiler H. Horton, William Lockwood, Frank L. Morse, and others, defendants, alleging that they conspired to, and did on March 13, 1893, break and enter his office in Endicott Building, St. Paul, and carry away his private books, papers and correspondence, to his damage \$50,000, for which sum he demanded judgment.

The defendants above named each presented to the Court his petition under oath, stating that the summons in the action was served on him March 20, 1893, while he was a member of the Senate or House of Representatives of this State engaged in his duties as such officer and while the two Houses of the Legislature were in session. Each petitioner claimed that he was, as such member, privileged from service of any civil process upon him, during the session and asked that the service on him be set aside and adjudged null and void.

The Court made orders on each petition requiring the plaintiff to show cause on April 10, 1893, why the prayer of the petition should not be granted. After argument, the Court on April 12, 1893, granted the prayer of the petition and set aside and vacated the service of the summons in each instance, saying:

In *Anderson v. Rountree*, 1 Pinney 115, the supreme court of Wisconsin held that a member of the Legislature was, during and for a limited time before and after the session, privileged from the service of summons; that this was a common law right unaffected by the statute providing for exemptions from arrest. At the time this decision was rendered, Minnesota was part and parcel of the Territory of Wisconsin, and this declaration of privilege by a court of last resort became the law of the land, or at least, as it seems to me, became and remains binding upon, and is to be followed by, all other courts within the jurisdiction, until overruled by a like tribunal of last resort, in the same manner and to the same extent as

if rendered by the Supreme Court of the Territory or of the State of Minnesota. At the same time, after a very careful examination of the authorities, I think the correctness of that decision is open to serious question. It is doubtless supported by a few ill-considered decisions, and by numerous *dicta* in other cases which assume the existence of such privilege as a common law right. Its existence, however, was denied in England as early as A. D. 1640 by that eminent jurist, Sir Orlando Bridgman, in the case of *Benyon v. Evelyn* (Bridgman's Reports, 333), upon a full review of the authorities and an exhaustive discussion of the question, and the doctrine then announced, as well as the profound learning and research of the jurist declaring it, were highly commended and indorsed by Lord Ellenborough in *Burdett v. Abbott*, 14 East, 134. See, also, *Gentry v. Griffith*, 27 Tex. 461; *Case v. Rorabacher*, 15 Mich. 531; *Merritt v. Giddings*, 4 McArthur, 55. It is for this court, however, to follow the decisions of our courts of last resort, and leave it to them to overrule ill-considered and erroneous declarations of the law, if any such have been made.

*C. D. & Thos. D. O'Brien*, for appellant.

The authorities cited and relied upon by the appellant upon the hearing of the motion are found in the *memorandum* of the Court below accompanying its order vacating the summons. To these may be added the case in our own Court, of *Kerwin v. Sabin*, 50 Minn. 320, where the rule is incidentally determined in considering the privileges of a senator of the United States during his term of office.

The question should be discussed entirely upon the construction of the several provisions of the constitution of this state applicable to it. Const. Art. 1, §§ 8, 10; Art. 4, § 8; Potter's Dwarrris Stat. 637.

*Warner, Richardson & Lawrence* and *H. W. Childs*, for respondents.

By the enabling act, 9 U. S. Stat. 407, § 12, passed in 1849, it was provided:

"That the inhabitants of said Territory shall be entitled to all the rights, privileges and immunities heretofore granted and secured to the Territory of Wisconsin and its inhabitants; and the

laws in force in the Territory of Wisconsin at the date of the admission of the State of Wisconsin shall continue to be valid and operative therein."

In 1840 in the case of *Doty v. Strong*, 1 Pinney 84, the provision of the constitution of the United States, Art. 1, § 6, similar to ours was examined by the Supreme Court of the Territory of Wisconsin, to which we then belonged. The word "arrest" was construed and the Court decided that it must be given a liberal rather than a literal meaning, and held that defendant Doty, a Territorial Delegate to Congress from Wisconsin, could not be sued. A similar decision was made in the case of *Anderson v. Rountree*, 1 Pinney 115, decided in 1841. There the defendant was a member of the Legislative Council of the Territory. The Court passed upon the meaning of the word "arrest" and held the privilege broad enough to exempt the defendant from any action, whether accompanied by actual seizure of his person or not. Thus it was, that when our constitution was adopted the word "arrest" had a fixed and definite meaning and included the service of civil process, as at common law all suits were commenced by arrest.

Where our state has borrowed from another a statute which has been passed upon by its courts it is held that the settled construction of that statute is adopted with it and must prevail. *Ozmun v. Reynolds*, 11 Minn. 459; *Nicollet Nat'l Bank v. City Bank*, 38 Minn. 85; *In re St. Paul & N. P. Ry. Co.*, 37 Minn. 164; *McNamara v. Minneapolis Cent. Ry. Co.*, 12 Minn. 388; *Drennan v. People*, 10 Mich. 169; *Daniels v. Clegg*, 28 Mich. 32; *Pangborn v. Westlake*, 36 Ia. 546; *Cronan v. Cotting*, 104 Mass. 245.

This interpretation was adopted in other jurisdictions, long prior to the Wisconsin decisions, and it has been repeatedly reaffirmed. *Bolton v. Martin*, 1 Dall. 296; *Geyer v. Irwin*, 4 Dall. 107; *Gibbes v. Mitchell*, 2 Bay 406; *King v. Coit*, 4 Day 133; *Nones v. Edsall*, 1 Wall. Jr. 189; *Holmes v. Morgan*, 1 Phill. 217; *Huderson v. Prier*, 9 Phill. 65; *Miner v. Markham*, 28 Fed. R. 387.

On grounds of public policy, witnesses and others are treated as having the same right, and it is in such cases that the word "arrest" has been most frequently construed. *Bridges v. Sheldon*, 7 Fed. R. 17; *In re Healey*, 53 Vt. 694; *Person v. Grier*, 66 N. Y.

124; *Sanford v. Chase*, 3 Cow. 381; *Larned v. Griffin*, 12 Fed. R. 590; *Sherman v. Gunderson*, 37 Minn. 118; *First Nat'l Bank v. Ames*, 39 Minn. 179.

The decision in *Wilder v. Welch*, 1 MacAr. 566, is contrary to all precedent. *Atchison v. Morris*, 11 Fed. R. 582; *Jacobson v. Hosmer*, 76 Mich. 234.

It is true that the right for which we are contending was surrendered by statute in England in 1770, but it none the less existed there up to that time. *Cassidy v. Stewart*, 2 Man. & G. 437.

Buck, J. The plaintiff commenced a civil action in the district court of Ramsey county, in this state, against the defendants, on the 20th day of March, 1893, alleging in his complaint that prior to that time the defendants, except defendants Wells and Scheffer, had unlawfully and maliciously conspired to break and enter the plaintiff's office, to take and carry away his private books, papers, and correspondence, and that in pursuance of such conspiracy they unlawfully directed and required said Wells and Scheffer to proceed to plaintiff's said office, and forcibly break and enter the same, and take and carry away therefrom plaintiff's said books, papers, and correspondence, and that on the 14th day of March, 1893, in obedience to said instructions and orders, said Wells and Scheffer did so unlawfully break and enter plaintiff's said office, and carried away said books, papers, and correspondence, and demanded judgment in the sum of \$50,000.

At the time of these transactions, several of the defendants, including Horton and Boggs, were members of the legislature, then in session.

Subsequently to the service of the summons upon them, but before the expiration of the time for answering, Horton and Boggs filed a petition in the court below alleging that they were members of the legislature of the state of Minnesota at the time of the service of the summons upon them, and that as such members they were privileged from the service of civil process during the session of the legislature, and that they were members of the house of representatives. Upon this petition an order to show cause was issued by the court below, requiring the plaintiff to appear and show cause why the service of the summons upon Horton and

Boggs should not be set aside upon the ground that they were members of the house of representatives. Upon the hearing, April 7, 1893, the court set aside the service of the summons upon the two defendants, Horton and Boggs, upon the ground that, as such members of the legislature of the state of Minnesota, they were privileged from the service of any summons in a civil action during the term of such legislature.

The question involved here is whether such privilege existed, and whether the service of the summons was valid. In order that there shall not be any misunderstanding of this opinion, we state that in no way do we pass upon the merits of the plaintiff's complaint, or whether the defendants had the right to commit the acts which plaintiff, in his complaint, charges them with having done. That question is not before us.

The question, however, involved, is one of very grave importance, and deserves, as it has received, the most careful and serious consideration. Even though, upon the first examination of the question, we may have had no doubts as to the law upon the subject, yet, when a large and intelligent body of men, representing a co-ordinate branch of the state government, claim certain privileges under a clause in the fundamental law, it becomes our imperative duty to examine the question with all the care, good faith, and ability which it is possible for us to do.

It is well understood that the powers of the state government are divided into three distinct departments,—legislative, executive, and judicial; and no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others, except in the instances expressly provided in the constitution. Const. Art. 3, § 1.

Each of the departments, within its proper sphere, is supreme. Probably, it would be difficult to find a more harmonious system of governmental workings than exists in these three co-ordinate departments, by which the functions of our state government are carried on. Each having due respect and proper regard for the rights of the other, no conflict need arise, as none has arisen, during the entire history of the state. Nor is this a case arising between these co-ordinate departments of the state government, but a question arising between one or more members of the legislature and the individual



citizen. It is therefore a judicial, and not a legislative question; that is, the question is not one of legislation or legislative powers upon general legislative subjects, but one affecting the privileges of the individual member, and the individual rights of the citizen. The main question is over the meaning or interpretation of a constitutional provision, which, in this case, is for the judiciary to determine, and which it must determine, because it has been brought before us. However disagreeable or difficult the questions submitted for our consideration and determination are, there is but one course for us to pursue, and that is to abide by the law and the constitution. It may not be inappropriate to cite the opinion of Chief Justice Marshall upon this subject in the case of *Cohens v. Virginia*, 6 Wheat. 404, where he said: "The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass by a question because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if brought before us. We have no more right to decline the exercise of deciding than we have to usurp a power not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and to conscientiously perform our duty."

Referring again to the main question, is there such inviolability surrounding a member of the legislature that service of a summons in a civil action cannot be made upon him while such legislature is in session? He has a right, during all such time, to bring a suit himself against the individual citizen, and individual rights should be equal and reciprocal; and they are so, unless there is an exemption or privilege paramount and superior in behalf of the legislator. All citizens should be deemed to stand equal in their rights before the law. This country recognizes no special privileged class, except those exempt by express provision of law or the constitution; and, when a citizen or officer claims such privilege, it is his duty to show affirmatively and conclusively that he is privileged above others of his fellow citizens.

We do not concede any such inherent right on the part of a member of the legislature as contended for by defendants' counsel. If it exists at all, it is because it is conferred by the constitutional pro-

vision in question. Before considering this provision more particularly, let us examine some of its other provisions, and see what are the rights of the people: "Government is instituted for the security, benefit and protection of the people." Const. Art. 1, § 1. "Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely and without purchase; completely and without denial; promptly and without delay, conformably to the laws." Id. § 8.

These words were not inserted in the constitution as a matter of idle ceremony, or as "a string of glittering generalities." It is the pride of the American citizen, and one of the grandest attributes of citizenship, that these provisions of the fundamental law stand as a protection and unassailable bulwark against the enforcement of unjust and illegal power. The constitution did not create property, or the liberty of the citizen, but it does protect both; and its prohibitions and inhibitions stay the march of organized or individual power, when it attempts the conversion of one or the destruction of the other. The exercise of official or individual power can only be enforced within the constitutional restrictions, and it should pause when the danger line is reached, and the life, liberty, or property of the citizen becomes thereby imperiled. The attempt sometimes made to exercise illegal power is the first warning which the people have of its assumed existence.

Turning now to the constitutional provision in question, we find it reads as follows: "The members of each house shall in all cases except treason, felony and breach of the peace be privileged from arrest during the session of their respective houses and in going to and returning from the same; for any speech or debate in either house they shall not be questioned in any other place." Id. Art. 4, § 8.

The defendants contend that the word "arrest," in the above constitutional provision, is broad enough to exempt them from the service of process, whether accompanied by actual seizure of the person or not, and that courts cannot strip them of this right. If this right or privilege exists, they would be correct in their contention. This, however, is not an attempt to strip them of power, but a question of the very existence of the power itself. If it does not

exist, then they are not stripped of any power whatever. An exemption or privilege cannot be created or lawfully exercised simply because it is claimed or asserted. The English parliament once asserted the legislative privilege of its members from arrest, and then, as an omnipotent judicial body, decided that such privilege existed, but that system of procedure is not a part of our governmental administration. And even there such proceedings became so odious and unpalatable, and such abuses were practiced under it, that the privilege was finally abolished by statute,—matters which we shall refer to hereafter in this opinion.

It is further contended by the defendants that the courts of the state of Wisconsin, prior to the date of our organic law, decided this question in accordance with their claims, and that when our constitution was adopted, October 13, 1857, the word "arrest" had a fixed and definite meaning in the minds of those who framed it, and that we should follow the decisions of the courts of that state; and in support of this view they cite the case of *Doty v. Strong*, 1 Pinney, 84, where a summons in a civil action was served on a delegate in congress from that state, and the court construed the clause in the constitution of the United States upon this question in accordance with the view of the defendants herein. The case of *Anderson v. Rountree*, Id. 115, (decided in 1841,) is also cited. It was the case of service of a summons upon a member of the legislative assembly of that state one day after the adjournment of the assembly, and the court held that he was privileged from the service of such summons. These are all of the decisions of the courts of the state of Wisconsin that we are referred to, and they were made prior to the passage of the organic act creating a territorial government for Minnesota.

To further support this view of their case the defendants quote from our organic act (passed in 1849) 9 U. S. Stat. 407, a part of section 12, as follows: "That the inhabitants of said Territory shall be entitled to all the rights, privileges and immunities heretofore granted and secured to the Territory of Wisconsin, and to its inhabitants; and the laws in force in the Territory of Wisconsin at the date of the admission of the state of Wisconsin, shall continue to be valid and operative therein." This quotation is correct, so far as it goes; but, to understand the full meaning and legal effect of

that section, we quote that portion omitted by defendants' counsel, and which follows the above extract, viz.: "So far as the same be not incompatible with the provisions of this act, subject however nevertheless, to be altered, modified or repealed by the governor and legislative assembly of the said Territory of Minnesota." Conceding, therefore, that the decisions of the courts of the State of Wisconsin are part of its laws, yet our organic act expressly reserves to Minnesota the right to alter, modify, or repeal such laws as were in force when the State of Wisconsin was admitted into the Union.

We are not willing to concede that this right would not exist without the above provision in the organic act. On the contrary, we think that the territorial legislature of Minnesota, or its constitutional convention, had a right to pass, frame, or adopt such provisions of law as they saw fit, not inconsistent with the provisions of the constitution of the United States. Nor are we bound by the decisions of the courts of the State of Wisconsin in the construction of their legislative laws similar in language to our constitutional provisions, however persuasive or able such decisions may be. And here it may be well to refer to the constitution of that State, adopted February 1, 1848, and in force when Minnesota was organized as a Territory, and when our constitution was adopted, in 1857; it being well understood that the Territory of Minnesota once formed a part of the Territory and State of Wisconsin. The provision of the constitution of that state in regard to the privilege of members of the legislature differs materially from ours. It is as follows: "Members of the legislature shall in all cases except treason, felony, and breach of the peace, be privileged from arrest, nor shall they be subject to any civil process during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session." Article 4, § 15. If it was the settled law of the Territory of Wisconsin that the word "arrest" had a fixed, definite, and settled meaning, and that it covered the service of a summons in a civil action, it seems strange that the latter phrase was inserted in the constitution of that state. Evidently, the members of that convention which framed the constitution had grave doubts about the soundness of the decisions of their court, or else they were guilty of tautology in framing their fundamental law; a transaction unheard of in any other instance, for constitu-

tions are framed in the most concise language possible. If the phrase, "nor shall they be subject to any civil process," be omitted, then the provision would be substantially like ours. Standing together, "arrest" means one thing, and "subject to civil process" means another, or else the latter phrase is utterly useless and unnecessary.

Now, assuming that the Minnesota legislature had the legal power to pass such laws as it deemed proper, not repugnant to the laws and constitution of the United States, we find that it passed a law defining the meaning of the word "arrest." 1851 R. S. ch. 113, § 1, is as follows: "Arrest is the taking of a person into custody, that he may be held for a public offense." Section 5 of the same chapter provides "that an arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer." The same statute provides "that a civil action is commenced by the service of a summons delivered to the defendant personally, or by leaving a copy of the summons at his usual place of abode." All these provisions of the statute of 1851 were in force at the time of the adoption of our constitution, and ever since have been the law of this state. The same definition and meaning of the word "arrest" is given by the lexicographers, and in our law dictionaries. We cite the following authorities in support of our statutory definition of the word "arrest:—" "An arrest is the taking, seizing, or detaining the person of another, touching or putting hands upon him in the execution of process, or any act indicating an intention to arrest." *United States v. Benner*, Baldw. 234. "An arrest signifies a restraint of the person; a restriction of the right of locomotion." *Hart v. Flynn*, 8 Dana, 191. "Arrest is the apprehension or detaining of the person in order to be forthcoming to answer an alleged or supposed crime." *County of Montgomery v. Robinson*, 85 Ill. 176. "By 'arrest' is to be understood, to take the party into custody. An arrest is the beginning of imprisonment, when a man is first taken and restrained of his liberty by power or color of warrant." *French v. Bancroft*, 1 Metc. (Mass.) 504.

The same meaning of the word "arrest" was well known and understood at the time of the adoption of our state constitution and it was not questioned in either of the two conventions; and it is a significant fact that the words, "nor shall they be subject to any civil process during the session of the legislature," found in the

Wisconsin constitution, were entirely omitted from our constitution. The meaning of the word "arrest," as defined above, has stood so long unchallenged that it will doubtless be a surprise to judges, lawyers, and the people of this state, that it is now for the first time, in any manner, questioned; and it will be a greater surprise if this court shall construe the law to be that, when an officer has served a summons upon a person in a civil action he has thereby arrested him. Nor does public policy or public interest demand any such interpretation of the word as contended for by the defendants. The provision in question, even as we construe it, is a most extraordinary one. We do not find it discussed during the constitutional debates at the time of the adoption of our constitution, being substantially the same as the provision in the constitution of the United States relating to members of congress, and seems to have been made a part of our constitution without debate or consideration by the conventions.

As members can only be arrested, during a session of the legislature, for treason, felony, and breach of the peace, does it not necessarily follow that they could not be arrested during such time for the most serious misdemeanors, unless such ones as may be included in the term "breach of the peace?" If so, then we are fully justified in saying that such provision is a most extraordinary one; and we do not feel justified in enlarging or extending the power by any strained or tortured definition of the word "arrest," or giving it a meaning in violation of the statute, of the decisions of the courts, and of lexicographers. The right already yielded up by the people in this respect seems sufficient, without having their rights in civil actions abated, and possibly lost or destroyed; and we have not the will or authority, by any strained construction, to aid in placing a constitutional provision beyond a reasonable and safe foundation, upon which the people may stand and defend their rights as against any branch of the sovereign power.

But it may be asked, what is the danger if the word "arrest" is construed as contended for by the defendants' counsel? Suppose a member should imprison his wife, child, friend, or a stranger, for some fancied or imaginary cause, and the writ of habeas corpus could not be served upon him, by reason of this legislative privilege,

what would become of our constitutional guaranty "that the writ of *habeas corpus* shall not be suspended."

What would this birthright of every American citizen be worth, if his personal liberty can be thus abridged and stand in abeyance, during a session of the legislature? This writ is not a criminal process. It can be served, and always is served, without arresting the defendant. Are the people ready to surrender up this great charter of the human rights in obedience to this demand of legislative privilege? Important as are legislative duties, the advantage of exempting a member from the service of this writ upon him would be a poor compensation for its denial, even for the period of three months.

Valuable property rights or interests might also be injured or destroyed if this theory of privilege is upheld. Take the subject of waste, which is legally defined to be whatever does lasting damage to the freehold, and, as ordinarily understood, implies taking of property without right, without sanction of law, in violation of right or liens thereon. The commission of waste might not only be a very serious injury to the individual citizen, but as between members of the legislature themselves. Suppose a senator residing in Dakota county owned a thousand acres of land, valuable principally for its timber, and he should sell the same to the senator from Otter Tail county, receiving back a purchase-money mortgage for nearly the full consideration of the land, and just at the commencement of a session of the legislature the senator from Otter Tail county should, with a large number of employes, commence cutting and removing such timber, with intent to forthwith cut and remove the same, and thus impair, if not substantially destroy, the mortgage security. Would not the senator from Dakota county have a right to apply to the court for redress, and, by a proper writ issued therefrom, enjoin the senator from Otter Tail county from committing such lasting damage? To say that this cannot be done is to say that we can trifle with vested rights in valuable property.

Again, suppose a member of the legislature, during a session thereof, should wrongfully and unlawfully enter upon a farm, and drive away a large amount of stock, and carry away other valuable farm

property, under an assumed claim of right, but not under such circumstances as would constitute larceny or a breach of the peace. Would the rightful owner be without remedy or redress during a legislative session because of this assumed legislative privilege? What are property rights worth, if there is no protection for them?

Suppose the time limited for commencing suit upon valuable causes of action against a member would expire during a session of the legislature? Would the cause of action be lost because of this privilege? Certainly it would, if defendants' contention is correct.

Suppose, also, that one of the members of the legislature should interfere with our public conveyances, such as railroads and street cars, and thereby impede public travel and interfere with the public business. Can there be no remedy, no relief, and no redress? Such a claim is preposterous. And the same might be said in cases of the creation and continuance of private or public nuisances, whereby serious injury might result.

So, too, in case of a member of the legislature becoming insolvent, he could dispose of his property, or attempt to do so, by some fraudulent act, and before the creditor could have any summons served, or other civil proceedings instituted, he might be without remedy, and his rights lost, before an adjournment of the legislature. Attachment proceedings might also be thus rendered useless. One more illustration: It is a well-known fact that at the time of election, in several instances, members have been holding important county or town offices, and continued to retain them, and receive the fees and emoluments thereof, in direct violation of a constitutional prohibition. Do the public interests require, or a sound public policy demand, that no writ of *quo warranto* shall be served upon a member of a legislature during a session thereof, in such cases? We say that the highest interests of the public, and especially the public welfare of the communities affected, such as counties and towns, demand that no such privilege or exemption shall exist.

However plausible the theory that a member of the legislature should not be embarrassed with private suits, and thus drawn aside from public duty, we think that the danger and disadvantage is more imaginary than real. We have never heard of an instance where men were deterred from serving as members of a legislature



because they were subject to service of process in a civil action, nor that public business was delayed or suffered from any such cause. It is a notable fact that the constitution provides that a majority of each house shall constitute a quorum for the transaction of business; and the people, through a constitutional amendment, have abolished annual legislative sessions. The rules of nearly all legislative bodies provide for granting leave of absence to individual members, and such leave is seldom refused. Nor, under ordinary circumstances, would a case be pressed for trial, against a member of the legislature, during a session thereof. If the claim of privilege is based upon the ground of public policy and public interest, it could as appropriately be claimed by the members of the executive and judicial departments, and by those who have ministerial duties to perform, most of whom are nearly all the time engaged in the discharge of their official duties. And may we not inquire, with great propriety, if it is not as important to execute the laws as to make them?

It remains for us to briefly refer to the authorities upon this subject. Among the English authorities, there appears to be some uncertainty and confusion upon the question of privilege from arrest. It was once the rule there, established to protect members of parliament from being molested by their fellow subjects or oppressed by the crown, and to prevent their being diverted from their public duties, and this privilege extended to exemption from the service of civil process. But as early as 1664, in the celebrated case of *Benyon v. Evelyn*, found in Bridg. 324, in the court of King's Bench, it was held: "It is lawful to sue out an original against a member of the House of Commons, although parliament is sitting." The opinion was delivered by the chief justice, Sir Orlando Bridgman, and he attacked Lord Coke for asserting a contrary doctrine in his treatise on the High Court of Parliament. In 4 Prynne's Brief Survey of Parliamentary Writs, (page 814,) it is stated that "the case of *Sir George Benyon v. Sir George Evelyn* was adjudged in the court of Common Pleas, (Hil. 15 & 16 Car. II.,) by all the judges thereof, upon demurrer, as follows: 'It was resolved upon solemn argument by all the judges (especially the lord chief justice, Sir Orlando Bridgman, arguing it very largely and learnedly) that the privilege of parliament did not take away the liberty of the subject to commence and prosecute actions of

trespass, debt, account, covenant, and the like, against members of Parliament, or their menial servants, even in Parliament time.'” Lord Campbell says of Sir Orlando Bridgman, the chief justice, “that this was his most celebrated judgment, and endeared his memory to the enemies of parliamentary privilege.” The action itself was one in debt for merchandise, and the defense interposed was that Sir George Evelyn was a member of the house of commons, and privileged from service of process. These privileges and exemptions were pressed and claimed in so many instances that they became odious and intolerable, so that the courts of justice were called upon to determine the question; and finally Parliament itself passed an act in 1769, which we find in 10 Geo. III. ch. 50, which declares: “Sec. 1. Any person may at any time, commence and prosecute any action or suit in any court of record, or court of equity, or of admiralty, and in all cases matrimonial and testamentary, against any peer or lord of parliament of Great Britain or against the knights, citizens or burgesses for the time being or against any of their menial or any servants or any other persons entitled to the privilege of parliament; and no such action, suit, or other process or proceeding thereupon, shall at any time be impeached, stayed or delayed by or under any color, or pretense of any privilege of parliament.” We believe that this act has been the law of England ever since, and settled all controversy upon the subject, and there established the doctrine contended for by the plaintiff here. This, it will be observed, was prior to our Declaration of Independence, July 4, 1776, and the adoption of the United States constitution, which was signed in 1787. We fail, therefore, to see how this claim of privilege made by the defendants could have been the common law of this country, or of the Territory or State of Wisconsin, or of this State, at any time.

The case of *Merrick v. Giddings*, reported in MacArthur & M. 55, is an able decision, rendered by Mr. Justice Wylie, holding that “a member of Congress of the United States is at all times as liable to service of process as any other individual, except that during his attendance on the session of congress, and in going to and returning, he is privileged from arrest in any suit or action.”

In the case of *Gentry v. Griffith*, 27 Tex. 461, it was held that “members of the legislature are not privileged against the serv-

ice of citation in civil suits by virtue of the provisions in the constitution of the state granting immunity from arrest to such members during the session of the legislature, and while going to and returning from the same."

While some of the authorities cited by the defendants sustain their contention, yet most of them are not in point, and not applicable to this question. The privilege from service of a summons or process in a civil action, of a witness or party, in certain cases, as in attendance upon court, is based upon the ground that it is necessary for the due administration of justice. If witnesses or parties living beyond our jurisdiction, or abroad, were subject to the service of civil process when coming within the jurisdiction of the courts of this state, they would be deterred from coming at all, as nonresidents cannot be compelled to appear here and testify, and there might frequently be a failure of the complete administration of justice in such cases. Nor is there a case cited by the defendants' counsel which, by force of its reasoning, or weight as authority, tends in the least to change our views upon the question submitted for our consideration. We do not think that any practical injury can result to the public or the individual members of the legislature from our holding in this case as we do, but that, on the other hand, public interest and private rights might receive serious injury, and become greatly impaired or destroyed, if defendants' contention is upheld.

Possibly, this opinion has been extended to an unnecessary length, but the importance of the question is our excuse and justification for so doing. In conclusion, we say that this constitutional provision is not a mass of jangled words and unfathomable mysteries, and it should not be wrenched from its obvious meaning, in direct violation of its straightforward, grammatical sense.

The order of the court below is reversed.

(Opinion published 57 N. W. Rep. 212.)

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**CATTLE GUARDS.** See **NEGLIGENCE**, 192.

**CHARGE TO JURY.**

After a jury had been out twenty four hours the Judge told them that if one or two of their number differed in their views of the evidence from the others, he or they should be thereby induced, although not required to surrender conscientious convictions, to doubt the correctness of his or their judgment and to inquire whether he or they might not be mistaken; *held*, not error. *Gibson v. Minneapolis & S. Ste M. Ry. Co.*, 177.

If a request to charge be rejected but the substance of it be included in the general charge it is not error. *Id.* *Holm v. Village of Career*, 199.

If in some respects the charge was erroneous, yet if the errors could not have affected the verdict, a new trial will not be granted. *Bank of Montreal v. Richter*, 362.

**CHATTEL MORTGAGE.**

It is incumbent on one who claims under a mortgage of chattels to show that it was executed in good faith and not for the purpose of defrauding creditors. *Fitzpatrick v. Hanson*, 195.

A mortgagee of chattels who took his mortgage with notice of a prior sale of the mortgaged property made by the mortgagor with intent to defraud his creditors cannot contest such prior sale on that ground. *Id.*

A mortgage on a threshing outfit contained a stipulation that the mortgagor should pay over to the creditor one half the earnings of the mortgaged property. Plaintiff brought replevin for breach of this condition but failed to prove such non-payment. *Williams v. Wood*, 323.

**CHATELS.**

Possession rightfully obtained is sufficient title as against a stranger. *O'Donnell v. Burroughs*, 91.

**CHOSE IN ACTION.**

An assignment of a part of a claim or demand is valid and the rights of the assignee will be protected and enforced in equity. *Schilling v. Mullen*, 122.

**CITY ORDINANCE.**

An ordinance in partial restriction of trade, and penal in its nature, should receive a somewhat strict construction. *City of Duluth v. Bloom*, 101.

**CLAIMS AGAINST ESTATES OF DECEASED PERSONS.** See PROBATE COURTS, 111.

**CLOUD ON TITLE.** See VENDOR AND VENDEE, 269.

An action may be maintained to set aside a judgment obtained by fraud and which creates a cloud upon the plaintiff's real estate. In such action he may have an interlocutory injunction. *Hamilton v. Wood*, 482.

**COMMISSION.**

Facts stated entitling a broker to commission for finding a borrower of money. *Scovell v. Upham*, 267.

**COMPOSITION AGREEMENT.** See CONTRACTS, 27

Notes secretly given to one of several creditors to induce him to execute the composition agreement are void and cannot be enforced. *Newell v. Higgins*, 82.

Any separate agreement by which one of the creditors secretly secures benefits to himself not shared by the others is a fraud upon them. *Id.*

**CONDEMNATION PROCEEDINGS.** See HIGHWAYS.

**CONSIDERATION.** See BILLS AND NOTES, 87.

**CONSTITUTIONAL LAW.** See DULUTH CITY CHARTER, 278.

The provision of the lien law (Laws 1889, ch. 20, § 5) making the estate of the lessor liable to mechanics for improvements made by the tenant is a valid exercise of legislative power. *Congdon v. Cook*, 1.

Art. 6, § 7, of the Constitution does not deprive the District Court of jurisdiction of an action against executors for a tort of the testator. *Comstock v. Mathews*, 111.

Laws 1891, ch. 11, relating to the sale of imitation butter is a valid exercise of the police powers. *State ex rel. v. Horgan*, 183.

Laws 1893, ch. 5, is in part invalid. It authorizes the commitment of persons to hospitals for insane without due process of law and is in that respect in conflict with both State and Federal Constitutions. *State ex rel. v. Billings*, 467.

A member of the Legislature is not privileged from the service of civil process during the session of the House of which he is a member. *Rhodes v. Walsh*, 542.

**CONTRACTS.** See EVIDENCE, 77; COMPOSITION AGREEMENT, 82; BILLS AND NOTES, 87; SPECIFIC PERFORMANCE, 115; BOND, 187; VENDOR AND VENDEE, 249, 269, 537; DEED OF REAL ESTATE, 338; DAMAGES, 422, 530; SALES, 226; POWER OF ATTORNEY, 455.

Construed. *Second Nat. Bank v. Sproat*, 14; *Nash v. Adams*, 46; *Security Bank v. Minneapolis C. S. Co.*, 107; *City Power Co. v. Fergus Falls Water Co.*, 172; *Minneapolis, St. P. & S. Ste. M. Ry. Co. v. Home Ins. Co.*, 236; *Sease v. Gillette-Herzog Mfg. Co.*, 349; *Davis & Rankin B. & M. Co. v. Knoke*, 368; *Williston v. Mathews*, 422; *Fagan v. People's S. & L. Ass'n*, 437; *Bradley v. Whitesides*, 455.

If executors under their general powers make a contract on behalf of the estate, it will bind them personally but not the estate. *Brown v. Farnham*, 27.

Each creditor under a composition agreement has a several cause of action in case of its violation. *Id.*



## CONTRACTS—Continued.

- Contracts incomplete on their face and not purporting to contain the whole of the mutual agreement may be supplemented by parol evidence of the further stipulations. *Aultman, M. & Co. v. Clifford*, 159.
- A contract to pay \$110 "in three fall payments at eight per cent." is uncertain and ambiguous. *Id.*
- A contract by a husband to convey his homestead is void if his wife do not join therein, but it is valid as to other lands included. *Weitzner v. Thingstad*, 244.
- A contract was rightly found by a jury to have been made. The evidence was wholly circumstantial. *In re Hummel's Estate*, 315.
- To ascertain the meaning of a contract the several clauses must all be construed together. *Scase v. Gillette-Herzog Mfg. Co.*, 341.
- Agreement by the purchaser of lumber to pay the seller's debt may be enforced by the creditor or his assignee. *Lovejoy v. Howe*, 353.
- A contract to pay for the construction of a cheese factory construed and held to be the joint contract of all the subscribers. *Davis & Rankin B. & M. Co. v. Knoke*, 368.
- W. agreed to furnish M. certain timbers of unusual dimensions and stipulated that on his failure M. might purchase the same in open market and charge the expense to W. in account. Held, that the damages for failure to furnish were not limited to the amount paid on a purchase from others. *Williston v. Motheus*, 422.
- If the seller of chattels on credit discover that the buyer is insolvent he may refuse to deliver them unless paid in advance. This is an implied term of the contract of sale. *Crummey v. Raudenbush*, 426.
- A certain contract construed as severable, not entire, as in effect two separate agreements although made at the same time. *McGrath v. Cannon*, 457.
- Parties may stipulate in their contract that it shall be construed and its validity determined by the law of this State if one of them resides here. *Smith v. Parsons*, 520.

## CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE.

- Whether an employee coupling street cars knew or had notice of defects in the coupling apparatus and was, because thereof, guilty of contributory negligence, was a question of fact and for the jury. *Delude v. St. Paul City Ry. Co.*, 63.
- A servant using dangerous machinery, called to act suddenly in an emergency, is entitled to show such facts in evidence on the question of his reasonable care. *Id.*

## CORPORATIONS.

- An insolvent banking corporation cannot by making an assignment under Laws 1881, ch. 148, defeat a proceeding already instituted for a receiver under 1878 G. S. ch. 76. *State v. Bank of New Eng.*, 139.
- A railroad corporation is deemed to reside in any county in which it has an office, agent or place of business. *Schoch v. Winona & St. P. R. Co.*, 479.

## COSTS.

- In actions for labor or service by an assignee of the laborer or servant such assignee is entitled to costs given by Laws 1891, ch. 41. *Clifford v. Northern P. R. Co.*, 150.

**COSTS—Continued.**

A defendant who appeals from the judgment of a Justice of the Peace and succeeds upon the only matter litigated, is entitled to costs although he does not reduce the recovery one half. *Foster v. Hansman*, 157.

Costs will not be given a plaintiff in an action for specific performance unless he tendered performance on his part before bringing suit. *Minneapolis, St. P. & S. Ste. M. Ry. Co. v. Chisholm*, 374.

**COUNTERCLAIM.**

On the sale of a harvester plaintiff warranted the machine and took defendant's notes for the price. Plaintiff brought suit on the notes and defendant answered, stating a breach of the warranty. *Held*, this was a defence by way of recoupment and not a counterclaim, nor barred by the statute of limitation of actions. *C. Aultman & Co. v. Torrey*, 492.

**COUNTY COMMISSIONERS.** See **TAX REFUNDMENT**, 118.

**CREDITOR.** See **INSOLVENCY**, 130, 509.

**CRIMES.** See **INCEST**, 464.

**CRIMINAL LAW.** See **INCEST**, 464.

A druggist is not criminally liable for a sale by one of his employes, not a registered pharmacist or assistant, if such sale was without the druggist's knowledge or assent. *State v. Robinson*, 169.

**DAMAGES.**

Anticipated profits cannot be the basis or measure of damages. *Doud Sons & Co. v. Duluth Milling Co.*, 53; *Williams v. Wood*, 323.

Plaintiff's colt was injured on his pasture fence while playing with defendant's colt running at large on the outside. *Held*, he was not entitled to even nominal damages. *Johanson v. Howells*, 61.

Damages held not excessive in *Delude v. St. Paul City R. Co.*, 63.

The measure of damages for failing to furnish certain unusual timbers as agreed, was not limited by a provision in the contract that on failure to so furnish, the buyer might purchase the same in open market and charge the expense to the seller. *Williston v. Mathews*, 422.

In an action for trespass and injury to real estate the measure of damages, in general, is the difference in market value of the property with and without the injury. *Nelson v. Village of West Duluth*, 497.

The measure of damages for failure to manufacture and deliver brick as agreed is the difference between the contract price and the price which the purchaser could buy them for in the market at the time and place of delivery. *Hewson-Herzog Supply Co. v. Minnesota Brick Co.*, 530.

Such market price is the price in the quantities and at the several times mentioned in the contract for the different deliveries. *Id.*

**DEED OF REAL ESTATE.**

A deed of land and a mortgage given to the grantor at the same time, to secure a part of the purchase price, will be construed together as making but one contract, vesting in the grantee the title subject to the mortgage. *Wright v. Nichols*, 338.

**DEFAULT, OPENING OF.** See **PRACTICE**, 287.

**DELIVERY.**

Sureties on the bond of a notary public, not yet executed by the principal, held not bound by his delivery of it in that condition. *Martin v. Hornsby*, 187.

**DEMURRER.** See PRACTICE, 489.

**DISCRETION OF COURT.** See PRACTICE, 287, 289.

**DISTRICT COURT.**

May appoint a guardian *ad litem* for a non-resident lunatic to bring suit to recover his property. It may so appoint or refuse in its discretion. *Plympton v. Hall*, 22.

Has jurisdiction of an action against executors of a will for a tort of the testator. *Comstock v. Mathews*, 111.

Under Duluth City Charter and the act providing for a system of public grounds in that City, the District Court may review, correct and revise assessments for local improvements. The statutes giving the Court this power are constitutional and valid. *State ex rel. v. Ensign*, 278.

If the trial judge goes out of office before making findings of fact in a case tried before him, his successor cannot decide it unless it is retried before him. *Bahnsen v. Gilbert*, 334.

Findings of fact not covering all the issues are defective. *Id.*

**DIVORCE.**

Collusion and agreement between the parties to an action for divorce, as to the judgment to be rendered, does not affect the jurisdiction nor render the judgment void. *In re Ellis' Estate*, 401.

That the wife was induced to bring the divorce suit by persuasion, ill-treatment and threats of the husband does not affect the validity of the judgment in a collateral proceeding. *Id.*

**DRUGGIST.**

Is not criminally liable for a sale by one of his employees, not a registered pharmacist or assistant, if such sale was made without the druggist's knowledge or consent. *State v. Robinson*, 169.

**DUE PROCESS OF LAW.**

Requires an orderly proceeding, adapted to the nature of the case, an opportunity to be heard and to defend, enforce and protect his rights. *State ex rel. v. Billings*, 467.

**DULUTH CITY CHARTER.**

The bond of a contractor, conditioned to pay for work and material used, may be made before the contract is executed, but in such case the contract must be shown to have been duly authorized and subsequently executed. The bond does not prove that it was. *Costello v. Doherty*, 77.

An ordinance, under the city charter, regarding second hand stores and junk shops, construed. *City of Duluth v. Bloom*, 97.

Under the charter and the act providing for a system of public grounds the District Court may review, correct and revise assessments for local improvements. The statutes are constitutional and valid. *State ex rel. v. Ensign*, 278.

**DURESS.**

That the wife was induced by persuasion, ill-treatment and threats of the husband to bring suit for and obtain a divorce will not affect the validity of the judgment in a collateral proceeding. *In re Ellis' Estate*, 401.

**EARNEST MONEY.** See VENDOR AND VENDEE.

**EASEMENT.**

Rights of the parties under a license to construct a railroad switch track to flouring mills, considered. *Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co.*, 371.

**ELEVATORS.**

It is the duty of one, who keeps and uses, in his place of business, an elevator for hoisting goods, to use ordinary diligence and care to keep the place reasonably safe for customers. Extraordinary diligence or care is not required. *Birnberg v. Schwab*, 495.

In defendant's place of business was an elevator on which his employees were permitted to ride to and from their work in the upper stories. While so riding they were servants and not passengers, and the degree of care required was that of a master and not that of a carrier of passengers. *McDonough v. Lanpher*, 501.

**EMINENT DOMAIN.** See HIGHWAYS, 223; DULUTH CITY CHARTER, 278.

**EQUITY.**

Relief may be granted in equity from a mistake of law where the adverse party is seeking to avail himself of the mistake and obtain an unjust advantage without consideration, and the other party is not blamable. The circumstances stated. *Lane v. Holmes*, 379.

When there is a mistake of both law and fact relief may be granted in equity. *Id.*

Relief granted from mistake, on a foreclosure sale, of the amount due on the mortgage. *Id.*

**ERROR.**

*Held*, to be without prejudice. *Second Nat. Bank v. Sproat*, 14; *In re Yetter's Estate*, 452.

**ESTATES OF DECEASED PERSONS.** See PROBATE COURTS, 111.

The one third interest in the real estate which goes to the widow is a part of the estate to be administered. A license to sell the interest of the estate in land to pay debts includes the widow's third. In the proceedings to sell, it is not necessary to go against the widow's third separately. *Scott v. Wells*, 274.

**ESTOPPEL.**

A warehouse receipt for goods stored stated that they were subject to charges. This did not estop the warehouseman from claiming for advance charges paid, as against the purchaser of the receipt, having no notice of the payment. *Security Bank v. Minneapolis C. S. Co.*, 107.

A party may be estopped by his acts or conduct, although not guilty of any fraudulent design to mislead. *Wetmore v. Royal*, 162.

Sureties, on the bond of a notary public, not yet executed by the principal, are not estopped to deny its validity by his delivery of it in that condition. *Martin v. Hornsby*, 187.

Statements made with no intent to mislead and with no intent that the hearer should act upon them and not shown to have been relied upon, do not create an estoppel. *Fitzpatrick v. Hanson*, 195.

Evidence *held* not to establish an estoppel, reference being made to a former action between the same parties. *Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co.*, 371.

ESTRAYS. See DAMAGES, 61.

EVIDENCE. See CHATTEL MORTGAGE, 195, 323; WITNESS, 415; GIFT, 452.

In a suit on a bond to the City of Duluth, under Sp. Laws 1891, ch. 55, § 15, conditioned to pay for all work and material used, it appeared that the contract for the work was made subsequent to the making of the bond; *held*, the bond was not proof of the due execution of the contract or that the board of public works had authority to make it. *Costello v. Doherty*, 77.

Parol evidence is proper where the written instrument is on its face incomplete and does not purport to state the whole of the mutual agreement of the parties. *Aultman, M. & Co. v. Clifford*, 159.

The burden of proof of no prejudice from a mistake is on him who asserts it. *Wetmore v. Royal*, 162.

Parol evidence not received to vary the terms of a policy of insurance between the parties. *Minneapolis, St. P. & S. Ste. M. Ry. Co. v. Home Ins. Co.*, 236.

Statements of a grantor made, after the deed and surrender of possession, regarding the good faith of the sale are not evidence against the grantee. They are hearsay. *Little v. Cook*, 265.

Circumstantial evidence *held* sufficient to prove the making of a contract by a person since deceased. *In re Hummel's Estate*, 315.

A judgment recovered against a Sheriff, for acts which are a breach of the condition of his official bond, is *prima facie* evidence against his sureties when sued upon the bond for the same breach. *Beauchaine v. McKennon*, 318.

Parol evidence may be given of the contents of a written instrument in the hands of, but withheld by, the opposite party after due notice to produce it. *Lovejoy v. Howe*, 353.

A witness will not be permitted to state his impressions unless he swears to the same as a matter of recollection and not of inference or opinion. *Id.*

To avoid a written contract for fraud, the evidence must be clear and persuasive and the party assailing it reasonably free from fault and negligence. *Minneapolis, St. P. & S. Ste. M. Ry. Co. v. Chisholm*, 374.

A copy of the proceedings of a court of another state is admissible in evidence here if authenticated according to the statute of this state, though not according to the Act of Congress. *In re Ellis' Estate*, 401.

An authenticated copy of a judgment roll is evidence of all that is properly contained in it, and is evidence *prima facie* that the judgment was properly entered in the judgment book. *Id.*

On the question of the value of a village lot, evidence of the amount of an assessment paid by the owner to improve the street in its front, is not competent. *Nelson v. Village of West Duluth*, 497.

Nor of the cost of removing earth imposed upon it or of building a retaining wall. *Id.*

EXAMINERS IN LUNACY. See HOSPITAL FOR INSANE, 467.

EXCEPTIONS TO CHARGE.

Where several requests to charge the jury are submitted to the Judge and refused, a general exception to the refusal, is unavailing on appeal. *Delude v. St. Paul City Ry. Co.*, 63.

**EXECUTORS.**

They cannot, by virtue of their general powers, make any new contract which will bind the estate. If they make such contract, its only effect will be to bind them personally. *Brown v. Farnham*, 27.

**FENCES.** See **DAMAGES**, 61.

**FINDINGS.**

Of facts supported by the evidence. *Davis v. Davis*, 110; *Pfefferle v. Wieland*, 202; *Cobb v. Cole*, 235; *Scovell v. Upham*, 267; *Covey v. Clark*, 311; *Williamson v. Hatch*, 344; *Lovejoy v. Howe*, 353; *Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co.*, 371; *Lang v. Ferrant*, 415; *Crummey v. Raudenbush*, 426; *Thompson v. Johnson*, 515.

A finding that the allegations in the complaint are true is defective, if there are issues raised by the answer and are not passed upon. *Bahnsen v. Gilbert*, 334.

A judge who did not hear the case cannot make additional findings therein. *Id.*

Where the trial court, by manifest oversight, omits to find upon an issue indisputably proven and not contested on the trial, it may be treated on the appeal as if decided. *Lovejoy v. Howe*, 353.

**FIXTURES.**

Platform weighing-scales set in the side of a street in front of the owner's store building and used for weighing loads on wagons, are not fixtures and do not pass by a deed of the lot and store building. *O'Donnell v. Burroughs*, 91.

Where buildings are erected on land by one having no interest therein but with license from the land owner, they are personal property of the builder and are not fixtures. *Merchant's National Bank v. Stanton*, 211.

Where the land is subject to a mortgage the buildings will not in such case become a part of the mortgage security. *Id.*

**FORECLOSURE OF MORTGAGE.** See **MORTGAGOR AND MORTGAGEE.**

On the foreclosure of a mortgage (under a power of sale) securing a debt without interest, the mortgagee bid in the premises, by mistake, for the debt with interest added. *Held* that he could obtain relief in equity and have the sale set aside, and that he need not tender compensation for his use and occupation of the premises from the time the right of redemption from the sale expired. *Lane v. Holmes*, 379.

When a mortgagee bids in the property at the foreclosure sale for more than is due him, he is liable to the second mortgagee for the surplus to the extent necessary to satisfy his mortgage. *Fagan v. People's S. & L. Ass'n*, 437.

This although the second mortgage is not due. *Id.*

**FORMER SUIT IN BAR.**

Machinery was sold with warranty and a note taken for the price. A recovery of damages for breach of the warranty is not a bar to an action on the note. *Trautwein v. Twin City Iron Works*, 264.

**FORTHWITH.**

This word in the Justice Court practice statute means within a reasonable time. *Sorenson v. Swensen*, 58.

**FRAUD.**

Any separate agreement, by which one of the creditors secretly obtains benefits not shared by all the creditors to a composition agreement with their debtor, is fraudulent and cannot be enforced. *Newell v. Higgins*, 82.

To avoid a written contract the evidence of fraud should be clear and persuasive and the plaintiff reasonably free from fault and negligence. *Minneapolis, St. P. & S. Ste. M. Ry. Co. v. Chisholm*, 375.

If after settlement of the demand the plaintiff fraudulently enters judgment on default and threatens to issue execution and enforce collection of it, he may be enjoined in a new suit, commenced to remove the lien and cloud upon the title to real estate. *Hamilton v. Wood*, 482.

**FRAUDULENT PREFERENCE OF CREDITOR.** See **INSOLVENCY**.

**GARNISHMENT.**

A voluntary general appearance on the part of a garnishee waives all defects in the garnishee's summons and in its service. *Houland v. Jewel*, 102.

It is not necessary that an affidavit for garnishment should state that the garnishee is a corporation. *Id.*

Where a claimant of the money garnished appears and pleads, setting up his claim, the issues should be tried upon evidence produced by the adverse parties. *Leslie v. Godfrey*, 231.

**GIFT.**

Unsatisfactory evidence of. *In re Yetter's Estate*, 454.

**GOOD FAITH.**

What is good faith considered. *Pfefferle v. Wieland*, 202, 206, 209.

**GRAIN WAREHOUSE.** See **RAILROADS**, 8.

**GRANTOR AND GRANTEE.** See **VENDOR AND VENDEE**, 249, 341; **EVIDENCE**, 265.

Platform weighing-scales set in the street, in front of the owner's building and lot, for weighing loads on wagons are not fixtures and do not pass by deed of the building and lot. *O'Donnell v. Burroughs*, 91.

The owner of the shore platted it and the adjacent submerged land in front into lots and blocks and sold and conveyed the lots. Held, that the purchaser of the outermost lots acquired the appurtenant riparian rights out to navigable water. *Gilbert v. Emerson*, 254.

**GUARDIAN AD LITEM.**

May be appointed by the District Court for a non-resident lunatic to bring suit for him in that Court. *Plympton v. Hall*, 22.

**GUARDIAN AND WARD.** See **LUNATICS**, 22.

**HABEAS CORPUS.**

Upon return being filed by the custodian of the person, the petitioner may plead thereto. If he fails to plead, the case will be determined upon the return. If held under a warrant the only inquiry will be whether it is void because of jurisdictional defects. *State ex rel. v. Billings*, 467.

**HEIRS AT LAW.**

Construed in a will to mean next of kin. *In re Swenson's Estate*, 300.

**HIGHWAY.**

In proceedings to lay out a highway, notice of the time and place of hearing on the petition is jurisdictional. *Town of Lyle v. Chicago, M. & St. P. Ry. Co.*, 223.

The notice must be given in strict conformity to the statute. *Id.*

If the notice fail to specify one of the tracts of land over which the highway is to pass, the proceedings as to that tract are without jurisdiction and are void. *Id.*

In an appeal from a conviction for obstructing a highway the notice of appeal need not designate the county attorney by his official title. *State v. Jones*, 329.

**HOMESTEAD.** See LAND GRANTS IN AID OF RAILROADS, 36; SOLDIER'S ADDITIONAL HOMESTEAD, 455.

A married man and his wife mortgaged their homestead and other lands and subsequently sold the other lands with warranty. Held the homestead thereby became the primary fund for the payment of the mortgage. *Merchant's Nat. Bank v. Stanton*, 211.

The contract of the husband to sell his homestead is void if his wife do not join therein. He is not liable in damages if he do not convey it. *Weitzner v. Thingstad*, 244.

The contract is valid as to the other land included. *Id.*

**HOSPITAL FOR INSANE.**

A warrant of commitment to a hospital is void on its face if it shows that the person committed was found to be insane by the Probate Judge on the certificate and recommendation of two examiners in lunacy, instead of by a jury as directed by the statute. *State ex rel. v. Billings*, 467.

The practice upon such examinations considered. *Id.*

Laws 1893, ch. 5, is in part unconstitutional. *Id.*

**IDEM SONANS.**

The names "Johnson" and "Johnston" are *idem sonans*. Absolute accuracy is not required in spelling names in legal proceedings, especially when the difference in spelling is not misleading. *State v. Jones*, 329.

**INCEST.**

The crime of incest was punishable under Penal Code, § 259, prior to Laws 1893, ch. 90. *State v. Herges*, 464.

**INDEMNITY BOND.**

The practice in bringing the sureties in an indemnity bond into the action against a sheriff, stated. *Richardson v. McLaughlin*, 489.

**INJUNCTION.**

In an action for an injunction and receiver under 1878 G. S. ch. 76, it is discretionary with the Court to grant and appoint or not before the formal determination of the material issues raised. But if the facts are admitted and there is no defence it will be an abuse of discretion to refuse. *State v. Bank of New Eng.*, 139.

Interlocutory injunction may be granted although a permanent injunction is not sought by the action, if other equivalent relief is sought. *Hamilton v. Wood*, 482.



**INJUNCTION**—Continued.

After answer, denying all the equities claimed in the complaint, it is usual to refuse injunction pending suit, but this is not an inflexible rule. *Id.*  
 An action may be maintained to enjoin sale on execution issued in another action and to inquire into the validity of such judgment. *Id.*

**INSANE.** See **HOSPITAL FOR INSANE.**

**INSOLVENCY.** See **ASSIGNMENT FOR THE BENEFIT OF CREDITORS**, 18, 509; **BANKS AND BANKING**, 139.

Creditors may petition to remove assignee under Laws 1889, ch. 30, § 6, before proving their claims. *In re Nicolin*, 130.

Such petition is properly heard upon order to show cause. *Id.*

The filing of a petition for a receiver of the property of an insolvent debtor does not *ipso facto* avoid a preferential transfer, thereafter made. *Williamson v. Hatch*, 344.

The knowledge of, or notice to, the creditor so preferred is the material question. If the insolvent debtor is not a trader the rule is less stringently applied. *Id.*

Where an insolvent debtor residing and doing business in this state agrees with a creditor residing in another state to send to him goods from this state as a preferential payment, and does so, it is a Minnesota transaction and unlawful. *In re Kahn*, 509.

A creditor who receives a preferential payment can not prove for the balance of his claims without restoring such payment. *Id.*

Nor can his assignee of the claims. *Id.*

When a creditor of an insolvent debtor secures an unlawful preference by the transfer of property, the transfer will at the suit of the assignee in insolvency be wholly void. It will not be partly valid because the creditor to secure the preference paid a part of the agreed price in money. *Thompson v. Johnson*, 515.

And where others participate in the preferential transaction and pay in money a part of such price, knowing the purpose is to prefer, they will not be protected. *Id.*

Such preferential transfer is void *ab initio*. *Id.*

**INSOLVENT.**

As used in the law of sales, "insolvent" means merely a general inability to pay one's debts. *Crummey v. Raudenbush*, 426.

**INSURANCE.** See **LIFE INSURANCE**, 95.

A certain insurance policy construed and held to cover only the property and interest of the insured and not property in its custody as common carrier or warehouseman. *Minneapolis, St. P. & S. Ste. M. Ry. Co. v. Home Ins. Co.*, 236.

**INTEREST.** See **USURY**, 520.

**JUDGMENT.** See **EVIDENCE**, 318.

In an action under 1878 G. S. ch. 66, § 285, to set aside a judgment for perjury and fraud, *Hass v. Billings*, 42 Minn. 63, is followed. *Wilkins v. Sherwood*, 154.

An action may be maintained to set aside a judgment for fraud and meantime to restrain its collection. *Hamilton v. Wood*, 482.

**JUDGMENT ROLL.** See **EVIDENCE**, 401.

**JUNK SHOP.** See **WORDS**, 97.

A furniture store, where furniture both new and second hand is exclusively dealt in, is not a junk shop. *City of Duluth v. Bloom*, 97.

**JURISDICTION.**

The District Court has jurisdiction of an action against executors of a will for a tort of the testator. *Comstock v. Mathews*, 111.

The statutory proof that the defendant cannot be found in this state must be filed in the Clerk's office before the publication of the summons begins, or the substituted service will not give jurisdiction to the Court. *Corson v. Shoemaker*, 386.

Collusion and agreement between the parties to an action for divorce, as to the judgment to be rendered, does not affect the jurisdiction nor render void the judgment entered. *In re Ellis' Estate*, 401.

If an action be tried in a county other than that declared by statute to be the proper county, it does not affect the jurisdiction. *Id.*

A voluntary appearance in the court of another state confers jurisdiction and the parties so appearing are bound by the judgment rendered therein. *Id.*

**JURY TRIAL.** See **CHARGE TO JURY**, 177.**JUSTICE'S COURT.**

A verdict was returned Saturday noon at which time the Justice was hearing other cases, and judgment was not rendered on the verdict until Monday. *Held*, it was entered in time. Forthwith means within a reasonable time. *Sorenson v. Swensen*, 58.

It is error for the Justice to dismiss an action for defects in the complaint without first ordering an amendment. *Middlestadt v. McIntyre*, 69.

**LABOR OR SERVICE.** See **COSTS**, 150.**LAND GRANTS IN AID OF RAILROADS.**

The grant of four additional alternate sections per mile made to the state May 12, 1864, in aid of the St. Paul and S. C. R. Co., was until selection made, a float only, attaching to no particular tracts. *Prince Invest. Co. v. Ehelm*, 86.

The withdrawal of the lands from market by the Secretary of the Interior gave the railroad company no vested right in the land as against one settling thereon under the federal preemption or homestead laws. *Id.*

As the railway company had no vested right in any particular tract until it was selected, it cannot question the *bona fides* of a prior entry by a settler. *Id.*

**LANDLORD AND TENANT.** See **MECHANICS' LIENS**, 1.

The entry by a landlord to post the notice of non-liability for improvements under the lien law (Laws 1889, ch. 200, § 5) is not a trespass. *Congdon v. Cook*, 1.

It is no defence to a tenant's claim, that his rights under a lease have been invaded, for the landlord to reply that the invasion was by another tenant, when the landlord consented and supported such other tenant in the invasion. *City Power Co. v. Fergus Falls Water Co.*, 172.

**LEASE.**

Certain provisions in a lease of a water power at Fergus Falls construed. *City Power Co. v. Fergus Falls Water Co.*, 172.

## LEGISLATIVE PRIVILEGE.

A summons in a civil action may be served on a member of the Legislature while the two houses are in session. *Rhodes v. Walsh*, 542.

## LICENSE TO PRACTICE MEDICINE. See PHYSICIAN, 20.

## LIENS. See MECHANICS' LIENS, 1; FIXTURES, 211; HOMESTEAD, 211.

## LIFE INSURANCE.

The insured gave his promissory notes for the first premium. The policy provided that it should not be valid or binding until the first premium was paid to the company. *Held*, the notes were taken in payment and the policy in force. *Union Central Life Ins. Co. v. Taggart*, 95.

## LIMITATION OF ACTIONS. See COUNTERCLAIM, 492.

Payments made generally upon an account will take all the items properly charged therein out of the statute for six years from the date of the last payment. *Gordon v. Ven*, 102.

The period of adverse possession need not be that next before the action commenced. If title becomes complete by adverse possession it will not be lost by subsequent interruption of the possession. *Dean v. Goddard*, 290.

The title acquired by adverse possession is a title in fee simple and divests the former owner of his estate. Adverse possession is hostile possession. The policy of the statute discussed. *Id*.

Recoupment is a defence and is not barred by the statute so long as the principal claim is not. *C. Aultman & Co. v. Torrey*, 492.

## LOCAL IMPROVEMENTS. See DULUTH CITY CHARTER, 278.

## LUNATICS.

The District Court may appoint a guardian *ad litem* for a non-resident lunatic to bring ejectment for him in that Court. It may so appoint or it may refuse, in its discretion. *Plympton v. Hall*, 22.

## MALICIOUS PROSECUTION.

Verdict in, set aside because unsupported by the evidence. The admitted facts negative the claim. *Genevey v. Edwards*, 88.

## MANDAMUS.

Where an information fails to state the facts required in Laws 1881, ch. 10, § 21, regarding refundment of tax paid at illegal tax sale, the writ must be denied. *State ex rel. v. Olson*, 118.

## MARRIED WOMEN. See VENDOR AND VENDEE, 537.

## MASTER AND SERVANT. See NEGLIGENCE.

In the absence of notice, the servant has the right to assume that the machinery and appliances furnished by the master are in good repair and condition. *Delude v. St. Paul City Ry. Co.*, 63.

The eye-bolt in the loop at the lower end of the brake staff on a freight car became loose and broke and the brakeman in attempting to set the brake was thrown off and killed. *Held*, it was the duty of the master to have inspected the brake and to have discovered the defect, and repaired it; that its neglect rendered it liable. *Sheedy v. Chicago, M. & St. P. Ry. Co.*, 357.

**MASTER AND SERVANT—Continued.**

If a servant employs an assistant and a third person is injured by the negligence of such assistant, the master is not liable in damages to the third person unless his servant had authority express or implied to employ the assistant. *Halutzok v. Great Northern Ry. Co.*, 446.

The master will be liable if the assistant was in fact rendering service for him by his consent express or implied. *Id.*

**MEASURE OF DAMAGES.** See **DAMAGES.****MECHANICS' LIENS.**

The Lien Law of 1889, ch. 200, § 5, includes lessors, and if the leased premises be improved by the tenant, the landlord's estate will be subject to the mechanics' lien therefor, unless notice is given or the omission is accounted for. *Congdon v. Cook*, 1.

A peaceable entry by the landlord to post the notice of no lien is not a trespass. *Id.*

This provision of the statute giving such lien is constitutional. *Id.*

Certain liens held, on the facts, co-ordinate but superior to a mortgage on the premises. *Nash v. Adams*, 46.

An incorrect lien statement will not be reformed so as to prejudice a subsequent incumbrancer actually misled by the incorrect statement. *Wetmore v. Royal*, 162.

If reformed, the burden of proof was on the lien claimant to show that the subsequent incumbrancer was not prejudiced. *Id.*

**MEDICINE AND SURGERY** See **PHYSICIANS**, 20.**MINNEAPOLIS CITY CHARTER AND ORDINANCES.**

An ordinance to prevent obstruction of streets construed and held not violated by push-cart pedlar standing his cart in the street half an hour in one place. *State v. Rayantis*, 126.

**MISDEMEANORS.**

The offense prohibited by Laws 1891, ch. 11, relating to the sale of imitation butter, is a misdemeanor and the penalty may be recovered by a criminal prosecution. *State ex rel. v. Horgan*, 183.

**MISNOMER.** See **IDEM SONANS**, 329.**MISTAKE.** See **MECHANICS' LIENS**, 162.

Relief may be given in equity from a mistake of law, where the adverse party is seeking an unconscionable advantage without consideration. *Lane v. Holmes*, 379.

Mistake of both law and fact may be relieved against. *Id.*

**MORTGAGE.** See **MORTGAGOR AND MORTGAGEE**, 338, 379; **FORECLOSURE OF MORTGAGE**, 437.

Held on the facts that a mortgage was subject to mechanics' liens. *Nash v. Adams*, 46.

A mortgage to a building association construed and held not to be security for "dues" or "subscriptions on stock." *Fagan v. People's S. & L. Ass'n*, 437.

A mortgage securing usurious negotiable paper is not, in the hands of an innocent assignee, excepted like the negotiable paper from the effect of the usury, under Laws 1879, ch. 66, § 3. *Smith v. Parsons*, 520.

**MORTGAGOR AND MORTGAGEE.** See **FIXTURES**, 211.

When buildings are erected on the mortgaged property, under license from the mortgagor, by one having no interest in the land, they will remain personal property and will not be subject to the lien of the mortgage. *Merchants' Nat. Bank v. Stanton*, 211.

A deed of land and a mortgage, given to the grantor at the same time to secure a part of the purchase price, will be construed together as making but one contract, vesting in the grantee the title subject to the mortgage. *Wright v. Nichols*, 338.

On the foreclosure of a mortgage, under a power of sale, securing a debt without interest the mortgagee bid in the premises, by mistake, for the debt with interest added. *Held*, that equity could give relief and set aside the sale at the suit of the purchaser. *Lane v. Holmes*, 379.

In such case the mortgagee in possession after the time to redeem has expired, need not tender compensation for the use and occupation to entitle him to relief. *Id.*

**MOTIONS.**

By making a motion to set aside the service of a summons on him, the defendant does not waive irregularity and submit to the jurisdiction. *Houlton v. Gallow*, 443.

**MUNICIPAL CORPORATIONS.** See **SIDEWALKS**, 199. .**NAMES.**

The names "Johnson" and "Johnston" are *idem sonans*. *State v. Jones*, 329.

**NEGLIGENCE.** See **MASTER AND SERVANT**.

If the negligence of a master and of a fellow servant jointly cause personal injury to another servant the master is liable. *Delude v. St. Paul City Ry. Co.*, 63.

Questions involving alleged negligence of the parties are properly submitted to the jury. *Id.*

A horse running at large went onto a railroad track, jumped a cattle guard six feet four inches wide and ran up the track a hundred rods to a bridge where it was struck by an engine and killed. The owner claimed that the cattle guard was insufficient and had a verdict for the value of the horse, which the Court set aside. *Held*, not error. *Green v. St. Paul, M. & M. Ry. Co.*, 192; *Arnold v. Same, Id.*

It is not negligence for a street car conductor to omit assisting a well, able-bodied passenger to alight from his car under ordinary circumstances. *Jarmy v. Duluth Street Ry. Co.*, 271.

The eyebolt in the loop at the lower end of the brakestaff on a freight car became loose and broke, and the brakeman, in attempting to set the brake, was thrown off and killed. *Held*, it was the duty of the master to have inspected the brake and to have discovered the defect and repaired it. Its neglect rendered it liable. *Sheedy v. Chicago, M. & St. P. Ry. Co.*, 357.

It is the duty of him who keeps and uses in his place of business, an elevator for hoisting goods, to use ordinary diligence and care to keep the place reasonably safe for customers. Extraordinary diligence or care is not required. *Birnberg v. Schwoib*, 495.

If the servant ride in the master's freight elevator up to her work in the fifth story of his building, the degree of care the master is required to exercise in operating the elevator is that of master and not that of a carrier of passengers. *McDonough v. Lanpher*, 501.

**NEGOTIABLE PAPER.**

A warehouse receipt for goods stored is not negotiable paper under 1878 G. S. ch. 124, § 17. *Security Bank v. Minneapolis C. S. Co.*, 107.

**NEW TRIAL.** See NEGLIGENCE, 192.

When the evidence is not manifestly and palpably in favor of a verdict this Court will not reverse an order setting it aside. *Green v. St. Paul, M. & M. Ry. Co.*, 192; *Arnold v. Same, Id.*

For accident or surprise which ordinary prudence could not have guarded against, a new trial may be granted. The circumstances considered. *Huntress-Brown Lumber Co. v. Wyman*, 262.

When there has been no abuse of discretion in granting a new trial the order will be sustained. *Sheehan v. Dowling*, 289.

A new trial was granted of the counterclaim for damages for detention of a threshing outfit, but was refused as to the plaintiff's claim in the action. *Williams v. Wood*, 323.

A new trial for newly discovered evidence refused, for the reason that the evidence was not newly discovered. *Nelson v. Finseth*, 417.

It is not prejudicial error to admit incompetent evidence of a fact otherwise conclusively proven, and a new trial will not be granted for such error. *In re Yetter's Estate*, 452.

New trial on the ground of excessive or inadequate damages can be granted only when it appears they were given under the influence of passion or prejudice. *Nelson v. Village of West Duluth*, 497.

In such case the doctrine of *Hicks v. Stone*, 13 Minn. 434, does not apply. *Id.*

**NEWLY DISCOVERED EVIDENCE.**

An affidavit held not to show newly discovered evidence for the reason that the facts stated in it as such had already been established on the trial. *Nelson v. Finseth*, 417.

**NEXT FRIEND.** See GUARDIAN AD LITEM, 22.**NEXT OF KIN.** See WILLS, 300.**NOTARY PUBLIC.**

One appointed a notary public procured two sureties to sign his bond as such officer but omitted to sign it himself, but he delivered it and it was inadvertently accepted; *held*, not a valid bond. *Martin v. Hornsby*, 187.

The sureties did not intend the bond should be delivered without the principal's signature and were not estopped. *Id.*

**NOTES AND BILLS.** See BILLS AND NOTES.**NOTICE.** See MECHANICS' LIENS, 1.

If notice be given a debtor that a part of the debt has been assigned to a third person, such notice fixes the rights of the parties and protects the assignee. *Schilling v. Mullen*, 122.

**NOTICE OF APPEAL.** See APPEAL FROM JUSTICE'S COURT, 329.**NUISANCE.** See ROADS AND STREETS, 126, 329.**OBSTRUCTING STREET.** See ROADS AND STREETS, 126, 329.

## OCCUPYING CLAIMANT LAW.

The County Auditor's certificate assigning to a purchaser the right acquired by the state at a sale of lands for taxes under Laws 1874, ch. 2, § 19, is an official deed within 1878 G. S. ch. 75, § 15. *Pfefferle v. Wieland*, 202.

There are two classes of occupying claimants. *First*, those who enter under color of private or unofficial title. They must enter in good faith. *Second*, those who enter under official deeds. These need have only "no actual notice of any defects invalidating such deed." *Id.*

OFFICER. See SHERIFF, 489.

OFFICIAL BOND. See SHERIFF, 318.

OFFICIAL DEED. See TAX TITLES TO LAND, 202.

## OLEOMARGARINE.

Laws 1891, ch. 11, relating to the sale of imitation butter is valid as a legitimate exercise of the police powers of the state. *State ex rel. v. Horgan*, 183.

The offense is a misdemeanor. The penalty is to be recovered by a criminal prosecution. *Id.*

OPENING JUDGMENT. See PRACTICE, 287.

ORDINANCES OF CITIES. See ROADS AND STREETS, 126.

PARKS. See DULUTH CITY CHARTER, 278.

PARTIES TO ACTIONS. See PRACTICE, 489.

In an action upon a composition agreement any creditor, being a party thereto, may bring a several action for his damages for the breach thereof. *Brown v. Farnham*, 27.

An action in equity may be maintained to recover a duly assigned portion of a demand, if the assignor and assignee as well as the debtor are made parties to the suit. *Schilling v. Mullen*, 122.

PAYMENT. See NOTICE, 122; CHATTEL MORTGAGE, 323; INSOLVENCY, 509, 515.

The debtor's promissory notes held taken as payment of premium for life insurance. *Union Cent. Life Ins. Co. v. Taggart*, 95.

PENAL CODE. See INCEST, 464.

## PERJURY.

In an action to set aside a judgment for perjury, *Hass v. Billings*, 42 Minn. 63, is followed. *Wilkins v. Sherwood*, 154.

PERSONAL INJURY. See ABATEMENT OF ACTION, 134.

From defective draw-bars, coupling trailer to grip-car on cable line. *Delude v. St. Paul City Ry. Co.*, 63.

From defective sidewalk. *Holm v. Village of Carver*, 199.

From falling, while alighting from a street car. *Jarmy v. Duluth Street Ry. Co.*, 271.

From the breaking of the eyebolt in the lower loop in a brakestaff on freight car. *Sheedy v. Chicago, M. & St. P. Ry. Co.*, 357.

Boy's foot crushed by baggage truck on the platform at railroad station. *Haluptzok v. Great Northern Ry. Co.*, 446.

**PERSONAL INJURY**—Continued.

From falling down an unguarded elevator-opening through the floor in a store. *Birnberg v. Schwab*, 495.

From foot being caught when riding on the freight elevator to her work in the fifth story of the building. *McDonough v. Lanpher*, 501.

**PHARMACIST.** See **DRUGGIST**, 169.**PHYSICIAN.**

A license to practice medicine issued under Laws 1888, ch. 125, authorizes the holder to practice surgery. *Stewart v. Raab*, 20.

**PLACE OF TRIAL.** See **VENUE**, 401, 479.**PLEADING.** See **ANSWER**, 341, 492; **APPEAL TO SUPREME COURT**, 507.

An omission to answer admits only those facts which are properly pleaded. *Doud Sons & Co. v. Duluth Milling Co.*, 53.

Allegations as to anticipated profits as the basis for damages *held* immaterial. *Id.*

It is an open question whether in a complaint against a corporation, it is necessary to allege its incorporation. *Howard v. Jeuel*, 102.

An answer setting forth only conclusions of law may be treated as sham and irrelevant, and stricken out. *Dennis v. Nelson*, 144.

In a suit on a promissory note by the indorsee, defendant's answer is sufficient if it state facts showing that the note was obtained by fraud. He need not allege that plaintiff had notice of the fraud when he purchased it. If plaintiff purchased in good faith, it is for him to so reply. *Bank of Montreal v. Richter*, 362-367.

An answer stricken out as sham. *Fletcher v. Byers*, 419.

**PLEDGE.**

A creditor holding chattels as security must be diligent to secure the best net results. He must be able to show his expenditures upon them were reasonable and necessary. *Second Nat. Bank v. Sproat*, 14.

**POLICE POWERS.** See **OLEOMARGARINE**, 183.**POLICY OF INSURANCE.** See **LIFE INSURANCE**, 95.

A certain policy construed as an insurance of the liability of the holder as a common carrier and warehouseman, and not an insurance of the interest of the shippers. *Minneapolis, St. P. & S. Ste. M. Ry. Co. v. Home Ins. Co.*, 236.

**POSSESSION.**

Is sufficient evidence of the title to chattels as against a mere stranger. *O'Donnell v. Burroughs*, 91.

**POWER OF ATTORNEY.**

A power of attorney to convey land to be thereafter acquired, construed. *Bradley v. Whitesides*, 455.

**PRACTICE.** See **GUARDIAN AD LITEM**, 22; **PARTIES TO ACTIONS**, 27; **JUSTICE'S COURT**, 69; **PLEADING**, 102, 144; **GARNISHMENT**, 102; **APPEAL TO SUPREME COURT**, 151, 507; **JUDGMENT**, 154; **CHARGE TO JURY**, 177; **NEW TRIAL**, 262; **PLEADING**, 362; **MOTIONS**, 443.

Where a complaint is served by mail, defendant has double time to answer. If judgment is prematurely entered, he has an absolute right to have it set aside. *Gillette-Herzog Mfg. Co. v. Ashton*, 75.



## PRACTICE—Continued.

Rules of Court may be suspended, and if the questions involved are rightly determined, the decision will not be reversed for noncompliance with such Rules. *Id.*

A voluntary general appearance on the part of a garnishee waives all defects in the garnishee summons and in its service. *Howland v. Jewell*, 102.

Creditors of an insolvent debtor may petition to remove his assignee under Laws 1889, ch. 30, § 6, before proving their claims. Such petition may be heard upon order to show cause. *In re Nicolin*, 180.

An action for a tort does not abate by the death of the plaintiff after verdict. *Cooper v. St. Paul City Ry. Co.*, 134.

A cause remanded with instructions to the trial court to amend its findings. *Pfefferle v. Wieland*, 202.

Where a claimant of money garnished appears and pleads setting up his claim, the issues should be tried upon evidence in the ordinary method. *Leslie v. Godfrey*, 231.

Defendant neglected to answer, and judgment was entered against him. He then moved the court to set aside the judgment and allow him to answer, but was refused. *Held* on the facts shown, that there was no abuse of the discretion of the Court. *Pine Mountain I. & C. Co. v. Tabour*, 287.

When there has been no abuse of discretion in granting a new trial, the order will be sustained. *Sheehan v. Dowling*, 289.

Upon affirmation of an order striking out an answer as sham the matter involved in *res adjudicata* and can not be again presented by appeal from the judgment. *Maxwell v. Schwartz*, 414.

A refusal to reopen the case after both parties had rested and to allow further evidence to be given, *held* not an abuse of discretion. *Nelson v. Finseth*, 417.

It is not prejudicial error to admit incompetent evidence of a fact otherwise conclusively proven. *In re Yetter's Estate*, 452.

A sheriff seized goods on a writ. Third persons appeared and claimed the goods. The plaintiff in the writ gave the sheriff a bond of indemnity with sureties. The third parties then sued the sheriff and he obtained an order making the obligors parties defendant with him. The complaint was not amended so as to name the obligors or to state their relation to the matter. They demurred on this ground but the demurrer was overruled. On appeal this order was affirmed. *Richardson v. McLaughlin*, 489.

PREEMPTIONS. See LANDGRANTS IN AID OF RAILROADS, 36.

PREFERENTIAL PAYMENT BY AN INSOLVENT. See INSOLVENCY, 509, 515.

PRINCIPAL AND SURETY. See NOTARY PUBLIC, 187.

The creditor took the note of the principal due in sixty days, for a part of the debt, indorsed it and had it discounted at a bank. When it fell due, the principal failed to pay it and the creditor paid it. He then brought suit against the principal and his sureties for the entire debt. *Held*, that the sureties were released, to the amount of the note, by the transfer of it to the bank. *Bell v. Forrestal*, 431.

## PROBATE CODE.

Laws 1889, ch. 46, was properly passed. *In re Ellis' Estate*, 401.

**PROBATE COURTS.** See **WILLS**, 401; **HOSPITAL FOR INSANE**, 467.

The Probate Code (Laws 1889, ch. 46) only authorizes the presentation to the Probate Court of claims against the estates of deceased persons arising on contract. *Comstock v. Mathews*, 111.

The one-third interest in a decedent's estate which goes to his widow is a part of his estate to be administered. A sale of the interest of the estate in his land to pay debts includes the widow's third. In the proceedings to sell, it is not necessary to go against her third separately. *Scott v. Wells*, 274.

Practice on an information filed, charging a person with insanity, considered. *State ex rel. v. Billings*, 467.

**PROXIMATE CAUSE.**

The injury to plaintiff's colt upon his pasture fence was not the result of any act of defendant or of his horse outside. It was an accident. *Johanson v. Howells*, 61.

**PUBLIC LANDS.** See **LANDGRANTS IN AID OF RAILROADS**, 36; **SOLDIER'S ADDITIONAL HOMESTEAD**, 455.

The grant of four additional alternate sections of land per mile made to the State, May 12, 1864, in aid of the St. Paul & Sioux City R. Co., was, until selection made, a float only, attaching to no particular tracts. *Prince Invest. Co. v. Eheim*, 86.

The withdrawal of lands from market by the Secretary of the Interior gave the railroad company no vested right in the land as against one settling thereon under the Federal preemption or homestead laws. *Id.*

**PUBLICATION OF SUMMONS.**

The statutory proof, that defendant can not be found in the state, must be filed in the clerk's office before publication of the summons is begun or the service will be invalid. *Corson v. Shoemaker*, 386.

**PURCHASE MONEY.**

A deed of land and a mortgage thereon to the grantor given at the same time to secure a part of the purchase price are but one contract vesting in the grantee the title subject to a lien for the unpaid price. *Wright v. Nichols*, 338.

**RAILROADS.** See **NEGLIGENCE**, 192, 357; **HIGHWAY**, 223; **MASTER AND SERVANT**, 446.

A railway company is by Laws 1887, ch. 10, § 2, subd. b, required to give equal facilities to all persons for shipping grain if they desire to build warehouses at its stations for that purpose. The state railway and warehouse commission may enforce this duty and impose terms upon all persons demanding such facilities. *Farwell F. W. Ass'n v. Minneapolis, St. P. & S. Ste. M. Ry. Co.*, 8.

The state railway and warehouse commission may require a railroad to construct a track to a grain warehouse at a station. *Id.*

A railroad is by statute deemed to reside in any county in which it has an office, agent or place of business. *Schoch v. Winona & St. P. R. Co.*, 479.

**REAL ESTATE BROKER.** See **BROKER**, 267.**REARGUMENT.**

No appeal lies from a refusal of the District Court to grant a reargument of a question of law. *St. Cloud Com. Council v. Karels*, 155.

**RECEIPT.**

A mere receipt for a sum of money, part of a larger sum due, will not preclude a claim for the balance. *Sease v. Gillette-Herzog Mfg. Co.*, 349.

**RECEIVER.**

In an action for an injunction and receiver under 1878, G. S. ch. 76, it is discretionary with the court to grant or refuse before the formal determination of material issues raised. But if the facts are admitted and there is no defense, it will be an abuse of discretion to refuse. *State v. Bank of New Eng.*, 139.

**RECOUPMENT.** See **ANSWER**, 492.**REFORMATION OF CONTRACTS.** See **SPECIFIC PERFORMANCE**, 115.

Real Property is the subject of the action if brought to reform the description of lands in a deed. *Corson v. Shoemaker*, 386.

**REFUNDMENT OF TAX PAID.** See **TAX REFUNDMENT**, 118.**RES ADJUDICATA.**

A judgment entered pursuant to a stipulation *held* construing the stipulation, not to be an adjudication of the rights of the parties to the stipulation. *Nash v. Adams*, 46.

An order striking out an answer as sham was on appeal affirmed. Judgment was then entered in the trial court and defendant appealed therefrom. *Held*, the former affirmance of the order was an adjudication of the matter involved. *Maxwell v. Schwartz*, 414.

**RESIDENCE OF CORPORATIONS.** See **CORPORATIONS**, 479.**RETURN ON APPEAL.**

The appellant must by case or other proper method make it appear by the return that copies of all the files and records used on the hearing in the Court below are sent up to this Court. *Bahnsen v. Gilbert*, 334; *Du Toit v. Fergestad*, 462.

**RIPARIAN RIGHTS.**

The owner of the shore platted it and the adjacent submerged land in front, into lots and blocks and sold and conveyed the lots; *held*, the purchaser of the outermost lots acquired the appurtenant riparian rights out to navigable water. *Gilbert v. Emerson*, 254.

**ROADS AND STREETS.** See **HIGHWAY**, 223.

City ordinance of Minneapolis *held* not violated by push cart pedlar standing his cart half an hour in one place. *State v. Rayantis*, 126.

On appeal from a conviction for obstructing a highway the notice of appeal need not designate the county attorney by his official title. *State v. Jones*, 329.

**RULES OF COURT.**

They may be suspended in the trial court in its discretion. This Court will not reverse for that reason. *Gillette-Herzog Mfg. Co. v. Ashton*, 75.

**SALE OF LANDS TO PAY DEBTS OF DECEASED PERSONS.** See **PROBATE COURTS**, 274.

**SALES.** See **CONTRACTS**; **INSOLVENCY**, 509, 515; **DAMAGES**, 422, 530.

An assignment by a debtor of all his nonexempt property in trust for his creditors will pass the title to his chattels situated outside this state. *Cocoy v. Culler*, 18.

If the seller of chattels on credit discover that the buyer is insolvent, he may refuse to deliver the chattels unless paid in advance. *Crummey v. Raudenbush*, 426.

"Insolvent" in this connection means merely a general inability to pay one's debts. *Id.*

Omission to state insolvency as the reason for the detention of the chattels does not waive the right. *Id.*

A contract of sale construed and held to be severable and not entire. *McGrath v. Cannon*, 457.

**SECURITY.** See **SUBROGATION**, 71.

**SERVICE OF NOTICES, PLEADINGS, &c.**

If the complaint is served by mail, defendant has double time to answer. *Gillette-Herzog Mfg. Co. v. Ashton*, 75.

**SERVICE OF PROCESS.**

The statutory proof that defendant cannot be found in this state must be filed in the Clerk's office before publication of the summons is begun or the service will be invalid. *Corson v. Shoemaker*, 386.

Real property is the subject of an action brought to reform the description of land in a deed. *Id.*

By moving to set aside the service of a summons on him the defendant does not waive the irregularity in the service or submit to the jurisdiction. *Houlton v. Gallow*, 443.

A member of the State Legislature is not exempt from the service of civil process while the House in which he serves is in session. *Rhodes v. Walsh*, 542.

**SET-OFF.**

One judgment set off against another between the same parties. Note to *Doud Sons & Co. v. Duluth Milling Co.*, 57.

**SHAM AND IRRELEVANT ANSWER.** See **ANSWER**, 144.

An answer stricken out as sham. *Fletcher v. Byers*, 419.

**SHERIFF.**

A judgment recovered against a sheriff for acts which are a breach of the condition of his official bond is *prima facie* evidence against his sureties in the bond, when sued for the same breach. *Beauchaine v. McKennon*, 318.

If a sheriff be sued for taking goods on execution claimed by a third person he may have the execution creditor and his sureties in the indemnity bond made defendants with him. The practice in such cases stated. *Richardson v. McLaughlin*, 489.

**SHORES.** See **RIPARIAN RIGHTS**, 254.

**SIDEWALK.**

If a sidewalk be build on the street by a private individual without authority and is suffered to remain and be used by the public, it is the duty of the municipality to keep it in repair and it will be liable for injuries caused by its neglect to do so. *Holm v. Village of Carver*, 199.

**SOLDIER S ADDITIONAL HOMESTEAD.**

The right under U. S. Rev. Stat. § 2306, is assignable. *Bradley v. Whitesides*, 455.

**SPECIFIC PERFORMANCE.**

Courts of Equity will not specifically enforce an executory contract, unless it be complete and certain in all its material and essential terms or capable of being made so by reformation. *Ham v. Johnson*, 115.

Specific performance refused because the title offered by vendor was jeopardized by disputed mechanics' liens. *Covey v. Clark*, 311.

It is not essential that plaintiff tender performance on his part before bring suit. It is enough that he be ready, able and willing to perform and offer performance in his complaint. But in such case he should not recover costs. *Minneapolis, St. P. & S. Ste. M. Ry. Co. v. Chisholm*, 374.

**STATE ASSIGNMENT CERTIFICATE.** See **TAX TITLES TO LAND**, 202.

**STATE BOARD OF MEDICAL EXAMINERS.** See **PHYSICIAN**, 20.

**STATE HOSPITAL FOR INSANE.** See **HOSPITAL FOR INSANE**.

**STATE RAILWAY AND WAREHOUSE COMMISSION.** See **RAILROADS**, 8.

**STATUTE OF LIMITATIONS.** See **LIMITATION OF ACTIONS**.

**STIPULATION.**

Construed and held not to be a dismissal or discontinuance of the action as against certain of the defendants therein. *Nash v. Adams*, 46.

**STREETS.** See **ROADS AND STREETS**, 126; **HIGHWAYS**.

**STREET RAILWAYS.** See **NEGLIGENCE**, 63.

When a street car stops for passengers to alight, it is not the duty of the conductor in ordinary circumstances to assist well, able-bodied passengers in getting off his car unless he sees one to be in special danger, or in some measure unable to take care of himself. *Jarmy v. Duluth Street Ry. Co.*, 271.

**SUBROGATION.**

The right of a creditor to retain a pledge or mortgage security for his benefit until the indebtedness secured thereby is paid in full, is superior to the equity of a surety who has paid a part only of such debt. *London & N. W. Am. M. Co. v. Fitzgerald*, 71.

**SUMMONS.** See **SERVICE OF PROCESS**, 386, 443.

A member of the State Legislature is not exempt from service of a summons in a civil action while the Legislature is in session. *Rhodes v. Walsh*, 542.

**SURETY.** See **SUBROGATION**, 71; **PRINCIPAL AND SURETY**, 431.

Released *pro tanto* by creditor giving principal time on a part of the debt. *Bell v. Forrestal*, 431.

**SURGEON.** See **PHYSICIAN**, 20.

**TAXATION OF COSTS.** See **COSTS**.

**TAXES AND ASSESSMENTS.**

If the holder of a certificate of sale for delinquent taxes pays the subsequent accruing taxes on the land he has no lien therefor under Laws 1874, ch. 2, § 28, in case his certificate is void, unless it is declared void by reason of something occurring or omitted subsequent to the judgment directing the sale. *Pfefferle v. Wieland*, 202.

**TAX REFUNDMENT.**

Statements and admissions of County Commissioners, made on presentation to them of a petition for refundment of tax paid on illegal tax sale, are not evidence against the State. *State ex rel. v. Olson*, 118.

**TAX SALES.**

The purchaser at a sale of lands for taxes and who subsequently pays the annual taxes levied on the land has no lien therefor by Laws 1874, ch. 2, § 28, unless the tax sale is declared void by reason of something occurring or omitted subsequent to the entry of the tax judgment. *Pfefferle v. Wieland*, 202.

**TAX TITLES TO LAND.**

State assignment certificate made under Laws 1874, ch. 2, § 19, is an official deed within 1878 G. S. ch. 75, § 15, known as the occupying claimant's law. *Pfefferle v. Wieland*, 202.

The fact that such certificate does not recite that the purchaser has also paid the amount of any subsequent taxes on the land does not render it void or irregular on its face. *Id.*

**TRIAL. See FINDINGS, 334.**

If material issues in a case tried before the Court are not passed upon, it is a mistrial. The successor of the trial judge is not authorized to make additional findings without a retrial. *Bahnsen v. Gilbert*, 334.

A refusal to reopen the case after the parties had both rested, and to allow further evidence to be given, *held* not an abuse of discretion. *Nelson v. Finseth*, 417.

**TROVER AND CONVERSION.**

When an actual conversion of chattels has taken place the owner is under no duty to receive them back when tendered by the wrongdoer in mitigation of damages, (following former decisions.) *Allen v. American B. & L. Ass'n*, 86.

**TRUSTS.**

A deed of land made to "N trustee for W. and C." infants and a mortgage given to the grantor by "N trustee for W. and C." to secure a part of the purchase price, are together but one contract and the grantee takes the title subject to a lien for the unpaid purchase price. *Wright v. Nichols*, 338.

**UNDERTAKING. See ATTACHMENT, 144.****UNKNOWN PARTIES. See PARTIES TO ACTIONS.****UNLAWFUL DETAINER. See FORCIBLE ENTRY AND UNLAWFUL DETAINER.****USES AND TRUSTS. See TRUSTS, 338.**

# USURY. See ATTORNEY'S FEE, 341.

The facts examined and a verdict by which the jury found a security usurious, set aside. *Rugland v. Thompson*, 466.

The test of usury is, will the contract if performed result in securing to the lender a greater rate of interest than is permitted by law. *Smith v. Parsons*, 520.

Interest at ten per cent a year on the money actually loaned is all the law allows. If a *bonus* is exacted it is to be deducted as of the date when it is payable. *Id.*

The exception of *bona fide* purchasers of negotiable paper in Laws 1879, ch. 66, § 3, from the operation of the usury law, does not extend to a mortgage securing such paper. *Id.*

# VENDOR AND VENDEE.

An executory contract to convey land is performed when the vendee accepts a deed. The contract is then merged in the deed. If the deed contain no covenants and there be no fraud or mistake of fact the grantee cannot on failure of title recover the consideration he paid. *Slocum v. Bracey*, 249.

This is so, although the deed thus accepted, is the deed of a third party. *Id.*

But the burden of proof of such acceptance is on the vendor. *Id.*

A conditional acceptance may be shown by the vendee. Such acceptance would not contradict the terms of the deed. *Id.*

A vendor agreed that if the title be found unmarketable and the vendee refuse it on that ground he would repay the earnest money. The title was found unmarketable. *Held*, the vendee might either fulfill, pay and take a conveyance and rely on the covenants, or refuse and receive back his earnest money. *Johnson v. Fuller*, 269.

Having elected to refuse the deed, the vendor or his grantee was entitled to have the contract cancelled and the cloud created by its record removed. *Id.*

A vendor contracted to sell lots and agreed that if the title should be found unmarketable he would return the earnest money. Certain disputed mechanics' liens thereon *held* to render the title unmarketable. *Corey v. Clark*, 311.

It is no defence to an action for an intermediate installment of the purchase price that the land is incumbered, if the incumbrance may be removed by the vendor before the time fixed for the execution of the deed. *Dukuth L. & L. Co. v. Kloddahl*, 341.

The contract of sale required the purchaser to pay the consideration before taking possession of the land or making improvements on it. But the purchaser entered and improved without paying. The vendor knew of the entry and improvement, but did not object. *Held*, that the condition for prepayment was waived. That while his possession continued the vendor's rights were not prejudiced by lapse of time. *Minneapolis, St. P. & S. Ste. M. Ry. Co. v. Chisholm*, 374.

Where one as his wife's agent contracts in her name to sell her land and receives part of the purchase money and pays it over to her and she is ready and willing to perform, the purchaser cannot treat the contract as void and recover the money paid. *Keystone Iron Co. v. Logan*, 537.

**VENUE.** See APPEALS FROM JUSTICE'S COURTS, 479.

If an action be brought and tried in a county other than that declared by statute to be the proper county for its trial, the Court will not for that reason be without jurisdiction. *In re Ellis' Estate*, 401.

An order granting or refusing a change of the place of trial of an action may be reviewed on appeal from the final judgment in the action. *Schoch v. Winona & St. P. R. Co.*, 479.

In an action against a Railroad Company it is deemed by statute to reside in any county in which it has an office, agent or place of business. *Id.*

**VERDICT.**

Sustained by the evidence. *Gibson v. Minneapolis, St. P. & S. Ste. M. Ry. Co.*, 177; *In re Hummel's Estate*, 315; *Williams v. Wood*, 323; *Bank of Montreal v. Richter*, 362-367; *In re Yetter's Estate*, 452; *Birnberg v. Schwab*, 495.

Not sustained by the evidence. *Genevey v. Edwards*, 88; *Rugland v. Thompson*, 466.

**WAGES OF EMPLOYEE.** See CONTRACT, 349.**WAREHOUSEMAN.** See RAILROADS, 8.

Persons engaged in shipping grain by rail are entitled to sidetrack to their warehouses at railway stations. *Farwell F. W. Ass'n v. Minneapolis, St. P. & S. Ste. M. Ry. Co.*, 8.

A warehouse receipt is not negotiable paper under 1878 G. S. ch. 124, § 17. *Security Bank v. Minneapolis C. S. Co.*, 107.

A warehouse receipt stated the goods were subject to charges. *Held*, this included advances paid as well as storage and put a purchaser of the receipt upon inquiry as to the charges. *Id.*

**WATERS.**

The owner of the shore platted it and the adjacent submerged land in front, into lots and blocks and sold and conveyed the lots. *Held*, the purchaser of the outermost lots acquired the appurtenant riparian rights out to navigable water. *Gilbert v. Emerson*, 254.

**WIDOW'S INTEREST IN DECEASED HUSBAND'S ESTATE.** See ESTATES OF DECEASED PERSONS, 274.**WIFE.** See DIVORCE, 401.**WILLS.**

The rule that the will speaks as of the day it takes effect, as to the persons who are to take under it, is not an unyielding one. *In re Swenson's Estate*, 300.

The words "heirs at law" used in a will may be construed in connection with the context to mean "next of kin." *Id.*

A testator made his will in 1884 giving the residuary part of his estate both real and personal to his "heirs at law." He died November 8, 1891, after Probate Code took effect. *Held*, he intended those who were his next of kin at the date of executing the will. *Id.*

Proof that deceased made a will and afterwards destroyed it while *non compos mentis* will not defeat the appointment of an administrator unless the contents of such will can be proved with such certainty that the will can be established. *In re Ellis' Estate*, 401.



## WITNESS.

He will not be permitted to state his impressions unless he swears to them as a matter of recollection, and not of inference or opinion. *Lovejoy v. Howe*, 353.

A witness may be discredited and his testimony rejected by the jury, without any direct contradictory evidence. *Lang v. Ferrant*, 415.

## WORDS.

"Forthwith" construed to mean within a reasonable time, all circumstances considered. *Sorenson v. Swensen*, 58.

"Junk-shop" is a place where old metals, ropes, rags, and odds and ends are bought and sold. *City of Duluth v. Bloom*, 97.

"Creditors" as used in Laws 1889, ch. 30, § 6, regarding insolvency includes all to whom the insolvent is indebted. *In re Nicolin*, 130.

"Heirs at law" in a will construed from the context to mean next of kin. *In re Swenson's Estate*, 300.

"Insolvent," as used in the law of sales, means merely a general inability to pay one's debts. *Crummey v. Raudenbush*, 426.

*LRD*

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